90-464 (1)

No. 90-

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Following this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989), whether abuse of discretion is the appropriate standard of judicial review for eligibility determinations made by the trustees of an employee benefits plan that expressly gives the trustees "full authority" to investigate and determine eligibility under the plan's collectively bargained eligibility criteria.

2. Assuming that abuse of discretion is the appropriate standard of review, whether the trustees abused their discretion by denying benefits to a class of pensioners who admittedly do not satisfy the plan's written eligibility criteria.

LIST OF INTERESTED PARTIES

The caption of this case in the court of appeals, reproduced as Appendix A to this petition (App. 1a-8a), lists all of the parties to the proceeding before the court of appeals.

Petitioner Bituminous Coal Operators' Association, Inc. ("BCOA") is a nonprofit multi-employer bargaining association that has no parent companies or subsidiaries. BCOA has the following members:

AMAX Coal Company
Cannelton Industries
Castle Gate Coal Company
Cedar Coal Company
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Consolidation Coal Company
Eastern Associated Coal Corporation
Florence Mining Company
Freeman United Coal Mining Company
Helvetia Coal Company
Hobet Mining, Inc.
Iselin Preparation Company
Itmann Coal Company
Kent Coal Mining Company
Keystone Coal Mining Corporation
McElroy Coal Company
Mathies Coal Company
Monterey Coal Company
Mt. Vernon Coal Company
O'Donnell Coal Company
Peabody Coal Company
Pennsylvania Mines Corporation
Price River Coal Company
Quarto Mining Company
Saginaw Mining Company
Southern Appalachian Coal Company
Southern Ohio Coal Company
Squaw Creek Coal Company

Westmoreland Coal Company
Windsor Coal Company
Zeigler Coal Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Bituminous Coal Operators' Association, Inc. ("BCOA") respectfully petitions for a writ of certiorari to review the judgment order of the court of appeals in this case, which affirmed without oral argument and without opinion the decision of the district court.

OPINIONS BELOW

The judgment order of the court of appeals (App. 1a-8a) is reported at 902 F.2d 1558. The opinion of the district court (App. 9a-42a) is reported at 720 F. Supp. 1169.

JURISDICTION

The judgment order of the court of appeals was entered on April 9, 1990. A timely petition for rehearing was denied on June 18, 1990. App. 57a-63a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 404(a)(1) and 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1104(a)(1) and 1132(a), are reproduced in Appendix G, 64a-65a. Section 404(a) describes the "prudent man standard of care" applicable to fiduciaries of ERISA plans, and Section 502(a) identifies the persons empowered to bring a civil action under the statute.

STATEMENT OF THE CASE

In *Firestone Tire and Rubber Co. v. Bruch*, 109 S. Ct. 948 (1989), this Court stated that a federal court should give deference to a fiduciary's eligibility determinations when "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 956. This case is a nationwide class action concerning eligibility for health benefits under a multiemployer benefits plan for retired coal miners. The plan expressly gives its trustees "full authority" to investigate and determine eligibility under the plan's collectively bargained eligibility criteria. Acting in accordance with this authority, the trustees (two appointed by employers, two appointed by the union, and one neutral trustee, Professor and former Dean Paul R. Dean of Georgetown University Law Center) denied eligibility to a class of pensioners who admittedly did not satisfy the plan's written eligibility criteria.

The district court, however, purporting to rely on *Firestone*, engaged in a *de novo* review of the trustees' eligibility determinations, overruled the trustees, and pronounced the whole class of pensioners eligible for benefits. The court of appeals affirmed the district court's decision in a one-sentence judgment order, which was rendered without oral argument and without a written opinion. Petitioner submits that the lower court's decision is directly contrary to *Firestone*, usurps the

trustees' role in determining eligibility, and establishes a dangerous precedent for unwarranted judicial intrusion into the eligibility standards of collectively bargained employee benefit plans.

The district court appears to have chosen its result, and to have prepared an opinion designed to reach that result, based on the court's desire to provide health benefits for all pensioners in the coal industry. Although the decision may appear to advance a laudable social goal, it is inconsistent with this Court's precedents and with the intent of the parties that negotiated the plan.

Moreover, the decision is likely to have disastrous consequences. It has already imposed a financial burden so significant that the plan's future is in jeopardy. Perhaps even more important, the district court's opinion will encourage substantially greater intrusion by federal courts into the eligibility determinations of administrators and fiduciaries, and will prompt disappointed applicants for benefits to turn increasingly to litigation, in the hope that the courts will provide benefits that the collective bargaining parties have not. The decision sets a dangerous precedent for judicial rewriting of privately negotiated agreements, in the guise of *de novo* review of trustees' eligibility determinations and rulings on benefit claims.

Factual Background

This case is a nationwide class action consisting of four separate lawsuits that were consolidated by the district court. It involves thousands of retired coal miners, many millions of dollars, and the future viability of a multiemployer trust fund that for more than a decade has provided health benefits to certain retired coal miners and their dependents. Although there are other cases pending in various federal and state courts regarding related eligibility issues, this case since its inception has been a leading case and an exceptionally important case. This is the only case in which BCOA, the employer

association that negotiated the eligibility criteria in question, is a party. And this is the only case in which the plan's trustees, who have interpreted the plan's eligibility rules for the past 12 years, have sought a declaratory judgment to clarify the plan's eligibility criteria nationwide.

Petitioner BCOA is a multiemployer bargaining association that since 1950 has negotiated, along with respondent United Mine Workers of America ("UMWA"), the national collective bargaining agreements for the coal industry. BCOA and the UMWA have negotiated, among other things, two health benefits plans for retired coal miners and their dependents. One plan, the UMWA 1950 Benefit Plan and Trust ("1950 Benefit Plan"), provides health benefits to pensioners who retired *prior* to January 1, 1976. The other plan, the UMWA 1974 Benefit Plan and Trust ("1974 Benefit Plan" or "the Plan"), provides health benefits to pensioners who retired on or *after* January 1, 1976. The eligibility rules of the 1974 Benefit Plan are the subject of this case.[1]

Prior to 1978, the 1950 and 1974 Benefit Plans were industry-wide multiemployer plans that together provided health benefits to virtually every pensioner in the coal industry, without regard for the operational and financial status of the pensioner's last employer. In 1978, however, the 1974 Benefit Plan was completely restructured. At the price of a 111-day strike, the longest coal strike in recent history, BCOA negotiated the right of employers to depart from the concept of an industry-wide fund, and to establish individual company health plans for their active and retired employees. Under the restructured system, each active miner and each miner who retired on or after January 1, 1976 was to look to his last employer for health benefits, and not to the in-

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[1] One of the eligibility rules of the 1950 Benefit Plan was the subject of this Court's decision in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

dustry-wide fund. Each employer was required to establish a single-employer health plan that provided the same benefits as the industry-wide fund.

The shift in 1978 from an industry-wide fund to individual company health plans was a significant departure from the way health benefits traditionally had been provided in the coal industry. Because of concerns over small coal operators going out of business and being unable to provide coverage through single-employer plans, the parties agreed to retain the 1974 Benefit Plan for the limited purpose of providing health benefits to pensioners of companies that were "no longer in business." In other words, after 1978, eligibility under the 1974 Benefit Plan was limited exclusively to pensioners of employers that were "no longer in business." [2]

The trustees were given the responsibility and authority to determine which pensioners were eligible for benefits under the 1974 Benefit Plan. In July 1978, the trustees exercised their authority to promulgate rules and regulations for determining eligibility under the Plan. In a formal interpretation referred to as "Q&A H-16," the trustees defined "no longer in business" to mean "out of the *coal* business." Under this definition, a pensioner could qualify for health benefits under the

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[2] The 1978 National Bituminous Coal Wage Agreement described the limited scope and purpose of the restructured 1974 Benefit Plan:

> The 1974 Benefit Plan and Trust shall continue after May 31, 1978, for the *sole purpose* of providing health and other non-pension benefits, during the terms of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein *because the signatory Employer (including successors and assigns) from which he retired is no longer in business.*

(Emphasis added).

1974 Benefit Plan if his last signatory employer went out of the coal business. The touchstone for determining whether a company was in the "coal business" was whether the company was receiving revenue from coal-related activities such as the production, sale, or transportation of coal.[3]

Q&A H-16 governed eligibility determinations for the 1974 Benefit Plan throughout the three-year term of the 1978 National Bituminous Coal Wage Agreement ("NBCWA"). The UMWA did not complain about or oppose the trustees' definition of "no longer in business." In preparing for the 1981 negotiations, BCOA recognized the need to obtain a more restrictive definition of "no longer in business" because, under the Q&A H-16 definition, a company would be "no longer in business" (and thus able to "dump" its retiree health costs on the Plan, for payment by other employers) simply because it had left the coal business, even if it remained in some other business such as construction, steel, chemicals, or transportation.

In response to BCOA's concern about financially viable companies dumping their retirees into the 1974 Benefit Plan, for payment by other employers such as BCOA member companies, the parties amended the Plan's eligibility criteria during the 1981 negotiations. In essence, the amended eligibility language (which has been unchanged since 1981) states that a pensioner is not eligible for health benefits under the 1974 Benefit Plan unless his last employer is completely out of the coal business, is financially unable to provide health benefits to its pen-

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[3] Q&A H-16 stated in relevant part:

> A company is "no longer in business" when: The company has not received income from the production or sale of coal, or transportation of coal, or related activities, for at least six months . . . .

sioners, and does not have a corporate affiliate with the financial ability to provide the health benefits.[4]

Since 1981, the Plan's trustees have consistently interpreted the Plan's "no longer in business" eligibility criteria as they are written. Because eligibility turns on the operating and financial status of the employer from which the pensioner retired, the trustees, employing a staff of auditors, have conducted a detailed investigation of the pensioner's last employer and then determined whether the applicant satisfies the "no longer in business" eligibility standard. In this case, the trustees determined that the pensioners involved were not eligible for benefits from the Plan because they last worked for companies that admittedly are still operating in the coal industry, albeit on a "nonsignatory" or nonunion basis, and have the financial ability to provide health benefits to the pensioners.[5]

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[4] The eligibility language states:

> For purposes of determining eligibility under the 1974 Benefit Plan and Trust, an Employer is considered to be "no longer in business" only if the Employer:
>
> (a) has ceased all mining operations and has ceased employing persons under this Wage Agreement, with no reasonable expectation that such operations will start up again; and
>
> (b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation, regardless of whether covered by this Wage Agreement or not) to provide health and other non-pension benefits to its retired miners and surviving spouses.

[5] Indeed, it was *stipulated* at trial that all of the pensioners in this case are from companies that formerly were signatory to a contract with the UMWA, but now are operating in some fashion in the coal business (often through various leasing and licensing arrangements) without a contract with the Union. Each of the companies refused to sign a successor collective bargaining agreement with the Union, stopped contributing to the Plan, and then attempted to dump its retirees into the Plan to obtain health care financed by BCOA members and other signatory companies. Each of

The District Court's Decision

The district court's analysis and entire approach to this case are directly contrary to this Court's decision in *Firestone*. The district court's decision, upheld by the court of appeals, gives no deference to the eligibility determinations of the Plan's trustees. Instead of reviewing whether the trustees abused their discretion in making their eligibility determinations, the district court engaged in a *de novo* review of the trustees' determinations, and in effect rewrote the Plan's eligibility criteria to ensure that no pensioner would be left without health benefits.

Even a cursory review of the district court's opinion (App. 9a-42a) shows that the court looked far beyond the Plan's written eligibility rules, on which the trustees' determinations were based, in an attempt to find some hidden "intent" of the negotiating parties. In the process, the court lost sight of its proper role, substituted its judgment for the judgment of the trustees, and cast aside the explicit eligibility limitations in the contract and trust document.

In overturning the trustees' determinations, and ruling that the entire class of pensioners is eligible for benefits under the Plan, the district court did not engage in the analysis required by *Firestone*. The court did not analyze, discuss, or even cite the considerable authority conferred on the trustees by the terms of the contract and the trust document.[6] In addition, the court did not

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the employers admittedly is still deriving substantial revenue from the production or sale of coal, and several of the companies have corporate parents with assets in excess of $1 billion.

[6] For example, Article III of the trust document gives the trustees "full authority . . . with respect to administration of coverage and eligibility . . . ." Article XX(g)(3) of the contract states that the trustees "shall police and monitor the rolls of those entitled to benefits . . . [and] shall promptly investigate and determine the eligibility or ineligibility of any beneficiary whose right to receive benefits from the Trustees has been challenged . . . ." Article

analyze, discuss, or even refer to the extensive past practice whereby the trustees have exercised, without challenge, discretionary authority to interpret the terms of the Plan and establish eligibility rules and standards.[7] This kind of analysis, mandated by *Firestone*, is completely omitted from the district court's decision, and its absence illustrates how the district court departed from the requirements of *Firestone* in rendering its decision.

The district court relied heavily on its reading of a prior decision by the Fourth Circuit, *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988) (*"Royal Coal"*), and on its *de novo* interpretation of certain language in a "general description" of benefits that refers to retaining a health services card "for life." The *Royal Coal* decision, however, pre-dated *Firestone* and never addressed or considered the question of eligibility when the pensioners' last employer is still operating in the coal business. In *Royal Coal*, the pensioners' last employer had gone completely out of the coal business and any business, and was insolvent. Although Royal Coal had a financially viable parent, the parent had never operated in the coal industry, and had no corporate affiliates in the coal industry.[8]

XX(e)(4) of the contract states that "[a]ll covenants, rights and obligations accruing to the Trusts, and the Benefit Plan, and the Trustees . . . shall be enforced by the Trustees, at their discretion . . . ."

[7] For example, since 1974 the trustees have promulgated numerous rules and regulations (referred to as "Q&As") defining disputed terms in the Plan such as "no longer in business." At least 19 interpretive Q&As have been issued by the trustees since 1978, and neither the UMWA nor anyone else has challenged the trustees' discretionary authority to issue these interpretive rulings.

[8] Relying on *Royal Coal* and district court cases following that decision, the UMWA argued below that BCOA was collaterally estopped from defending the trustees' eligibility determinations in this case. But BCOA was not a party to any of the cases upon which

The district court's reliance on the "for life" language was equally misplaced. This language does not concern or define eligibility under the Plan, is not even included in the trust document, refers to a health services card that no longer exists, and, by its terms, is qualified in its entirety by the more detailed information contained in the trust document.[9] BCOA submits that it would have been an abuse of discretion and a violation of fiduciary duty for the trustees to ignore the express eligibility language of the trust document and instead rely on noneligibility language in a general description of benefits that, by its terms, is superseded by the trust document.

Finally, in a transparent attempt to insulate its decision from review, the district court also stated that if it were required to give deference to the trustees' eligibility determinations, it would hold in the alternative that the trustees' decision to deny benefits was arbitrary and

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the UMWA relied, and, in any event, none of those cases involved employees that were still operating in the coal business. Because BCOA clearly could not be bound by cases to which it was not a party, the district court correctly recognized that BCOA was fully entitled to vindicate its own contractual rights and defend its own economic interests in this litigation. App. 38a-39a. *See Martin v. Wilks*, 109 S. Ct. 2180 (1989).

[9] The language is found in a "general description" of benefits which states:

> This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and *is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts*, copies of which are on file and available for inspection at the offices of the UMWA Health & Retirement Funds, 2021 K Street, N.W., Washington, D.C. 20006. *The specific provisions of the Plans will govern in the event of any inconsistencies between the general description and the plans.*

(Emphasis added).

capricious. App. 30a. The court, however, never explained how it could be an abuse of discretion for trustees to follow the Plan's written eligibility criteria, especially when ERISA requires trustees as fiduciaries to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D). App. 64a.

In sum, the district court's cover-everyone approach produced several astonishing conclusions. First, in its zeal to ensure that no pensioner would be denied coverage, the court ignored the fundamental point that eligibility language, by its very nature, means that some applicants will qualify for benefits and some will not. Second, the district court's approach led to the implausible conclusion that numerous coal companies are "no longer in business" even though those companies admittedly are still operating in the coal industry, albeit on a nonsignatory or nonunion basis. Third, because the 1974 Benefit Plan is funded solely by hourly-based contributions from employers that are signatory to a contract with the UMWA, the effect of the court's decision is that by going nonsignatory or nonunion, any employer can dump its retirees into this multiemployer plan and obtain health benefits that are financed by the nonsignatory's competitors. Ultimately, this will lead to the demise of the Plan because no signatory employer will be willing to continue to participate in the Plan and absorb the retiree health costs of its nonunion and nonsignatory competitors.

The Court of Appeals' Proceedings

Despite the importance of the legal issue involved in this case to employee benefit plans in general, and to the coal industry in particular, a panel of the court of appeals affirmed the district court's decision without oral argument and without opinion. The panel's April 9, 1990 judgment order states in one sentence that the district court's decision was being affirmed. App. 8a. The

panel did not provide any reasons for its action. It did not state that it agreed with or was adopting some or all of the rationale of the trial court. It provided no explanation whatsoever for its summary affirmance. *Id.* Given the national significance of this case, and the important legal and economic issues involved, the court's decision to give the case such short shrift was unjustifiable.

BCOA timely filed a petition for rehearing and a suggestion for rehearing *en banc*. The court of appeals ordered the UMWA to respond to the petition. But by order dated June 18, 1990, the court of appeals denied both the petition for rehearing before the panel and the suggestion for rehearing *en banc*. App. 57a-63a.

REASONS FOR GRANTING THE PETITION

The decision below represents a significant departure from this Court's decision in *Firestone*. It endorses a blatant judicial intrusion into the eligibility standards of a collectively bargained employee benefits plan, and usurps the discretionary authority granted plan trustees to determine benefits eligibility and to construe the terms of a plan.

Review is needed to resolve the very substantial judicial confusion that has arisen since *Firestone* as to the appropriate scope of review to be applied to eligibility determinations by plan trustees. Since *Firestone* was decided, several lower courts have readily deferred to eligibility determinations by plan trustees vested with the power to construe disputed or doubtful plan terms or to resolve disputes over benefits eligibility. *See, e.g., Richards v. UMWA Health and Retirement Fund*, 895 F.2d 133 (4th Cir. 1990); *de Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989). These decisions, we submit, correctly follow this Court's reasoning in *Firestone*. In several other cases, however, courts have conducted a *de novo* review of plan fiduciaries' eligibility determinations. In doing so, they have acted not on the basis of the fiduciaries' lack of authority under the plan, but on

the basis of factors other than those *Firestone* deemed appropriate. *See, e.g., Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989). Like these cases, the decision below failed to accord adequate weight to the ruling of the trustees, the very persons who, under the collective bargaining agreement and the trust document, have been entrusted with the task of applying the Plan's eligibility criteria.

By discarding the trustees' eligibility determinations and starting from scratch, the district court effectively deprived the parties of the procedure for which they had bargained. The court's decision thus suffers from the same flaw that this Court identified in the analogous content of a collectively bargained arbitration clause in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

There, in reversing a lower court decision that had set aside an arbitrator's award, the Court stressed that the parties had bargained for a particular form of decision-making and that federal courts should be very reluctant to disturb the product of the parties' chosen procedure. *Id.* at 37-38 ("Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept"). *See also United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his").

Here, BCOA and the UMWA granted the trustees, not the courts, "full authority" to decide eligibility questions and resolve benefit claims. The district court's ruling—and, indeed, its entire approach to the case—ignored that part of the bargain.

The extent to which fiduciaries' eligibility determinations will be reconsidered and redecided by the federal courts is an important issue on which a clear national rule is essential. Literally thousands of eligibility determinations are made every day by fiduciaries of ERISA-covered plans. These decisions affect thousands of health and retirement funds and millions of employees across the country. The pension and benefit system in this country will be subject to a confusing and conflicting set of rules if the finality of eligibility determinations varies with the jurisdiction in which challenges are brought. The petition for certiorari should be granted to resolve this conflict.

I. REVIEW IS NEEDED TO CLARIFY WHEN AND UNDER WHAT CIRCUMSTANCES COURTS SHOULD DEFER TO ELIGIBILITY DETERMINATIONS BY PLAN TRUSTEES FOLLOWING THIS COURT'S *FIRESTONE* DECISION.

Purportedly relying on this Court's *Firestone* decision, the district court ruled that the appropriate standard of review of the trustees' decision to deny benefits was *de novo*. The district court's entire analysis of *Firestone* consists of three sentences in its findings of fact and conclusions of law:

> The appropriate standard of review of the Trustees' decision to deny benefits to these pensioners appears to be de novo review. *Firestone Tire and Rubber Co. v. Bruch*, —— U.S. ——, 109 S. Ct. 948, 103 L. Ed.2d 80 (1989). Nothing in the collective bargaining agreements or plan documents prescribe [*sic*] a more stringent standard. Since the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust.

(App. 30a). The district court misapplied this Court's *Firestone* decision.[10]

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[10] Although the district court stated in the alternative that it found the trustees' decision to deny benefits to be arbitrary and

A. This Court Established an Abuse of Discretion Standard for Review of Decisions Made by Plan Fiduciaries under the Authority of a Plan.

In *Firestone*, this Court held "that a denial of benefits challenged under § 1132(a)(1)(B) [of ERISA] is to be reviewed under a *de novo* standard *unless the Benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*" *Firestone*, 109 S. Ct. at 956 (emphasis added). When the administrator or fiduciary has such discretionary authority, an abuse of discretion or arbitrary and capricious standard applies. *Id.* at 955-56.

The *Firestone* decision was based on principles of trust law under which a deferential standard of review applies when a trustee is exercising discretionary powers. 109 S. Ct. at 954. Under trust principles, whether the exercise of a power is discretionary or mandatory depends on the terms of the trust document. *Id.* "When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of *a discretion vested in them by the instrument under which they act.*" *Id.* (emphasis in original).

Applying these principles to suits under ERISA § 1132, the Court noted that "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." 109 S. Ct. at 956.

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capricious (App. 30a), the court did not state why it was arbitrary and capricious for the trustees to follow the written eligibility rules of the contract. The court's alternative holding was an obvious attempt to protect from further review the result that the court was determined to reach in any event. This alternative holding brings to the surface the second important question presented in this petition—assuming that abuse of discretion is the appropriate standard of review, whether the trustees abused their discretion by denying benefits to a class of pensioners who admittedly do not satisfy the terms of the Plan's written eligibility criteria. That issue is discussed in part II, *infra*.

Consequently, the Court held that when a denial of benefits is challenged under § 1132(a)(1)(B), if the benefit plan gives a plan trustee discretionary authority to determine eligibility or construe the terms of the plan, a court should not disturb the trustee's interpretation if it is reasonable. *Id.* at 954.

B. The District Court Ignored the Express Grants of Authority to the Plan Trustees in the Collective Bargaining Agreement and the Plan Document.

Under the proper interpretation of the standards set out in *Firestone*, the district court should have applied an abuse of discretion or arbitrary and capricious standard in this case. Both the NBCWA and the trust document give the Plan trustees discretionary authority to construe the terms of the Plan *and* to determine eligibility for benefits. Article XX(e)(4) of the NBCWA states:

> *All covenants, rights and obligations accruing to the Trusts, and the Benefit Plan, and the Trustees* of the Pension and Benefit Trusts and Plans, and all breaches, violations and/or defaults of any provision of this Article pertaining to the Trusts and Plans, the Trust Agreements, or Pension Plans, *shall be enforced by the Trustees, at their discretion*, through any and all available legal means, without first exhausting the grievance and arbitration procedures set forth in this Agreement.

(emphasis added). Similarly, Article XX(g)(3) of the NBCWA states:

> *The Trustees shall police and monitor the rolls of those entitled to benefits from the Trusts. . . . The Trustees shall promptly investigate and determine the eligibility or ineligibility of any beneficiary* whose right to receive benefits from the Trusts has been challenged by an Officer of the International, District or Local Union or by any Employer.

(emphasis added). In addition, the trust document, which was negotiated by the parties and incorporated by reference into the collective bargaining agreement, reaffirms the discretionary authority granted the trustees under the NBCWA and contains its own grants of discretionary authority. For example, Article III states:

> Subject to the provisions of the 1974 Benefit Trust, *the Trustees shall have full authority,* within the terms and provisions of the Labor-Management Relations Act of 1947, and other applicable law [,] *with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds and all other related matters.*

(emphasis added). And, Article II, Section E(4) of the trust document specifically grants the trustees discretionary authority to determine the very question at issue in this case—the meaning of the phrase "no longer in business":

> *The Trustees of the 1974 Benefit Plan and Trust shall determine . . . when an employer is "no longer in business"* as that term is used in this section J and Article XX of the 1978, 1981 or 1984 Wage Agreement, whichever is applicable.

(emphasis added). The district court's decision ignores all the above express grants of discretionary authority to the Plan's trustees, in patent disregard of the threshold inquiry mandated by *Firestone.*

Indeed, the express grant of authority to the trustees to determine when an employer is "no longer in business" is meaningless under the decision below. According to the district court's opinion, that determination is unnecessary; if a pensioner's last employer does not cover him, *ipso facto* the 1974 Benefit Plan does. By holding, without any basis in the trust document, that the question of eligibility under the Plan depends on whether the pensioner's last employer is "legally obligated" to pro-

vide benefits, the district court cavalierly pronounced the out-of-business inquiry to be "irrelevant." The court stated, "The eight former signatory employers at issue have no legal obligation to pay benefits to plaintiffs, as the Benefit Plan concedes, and *therefore the financial status of these employers is simply irrelevant to a determination of health benefits entitlement.*" App. 30a.

C. The District Court Ignored the Trustees' Past Practice of Exercising Their Discretionary Authority under the Plan.

The district court also ignored a substantial past practice whereby the trustees have exercised the discretionary authority conferred on them by the trust and contractual provisions quoted above. It is undisputed that since 1974, the trustees have promulgated numerous rules and regulations (called Q&A's) to define disputed terms in the plan such as "no longer in business." At least 19 interpretive Q&A's have been issued by the trustees since 1978 and the trustees' discretionary authority to take such action has never been challenged.

Moreover, it is undisputed that in exercising their discretion to apply the "no longer in business" eligibility criteria at issue in this case, the trustees have had the authority since 1978 to investigate the pensioners' last signatory employers, and their related corporate entities, to ascertain their operational and financial status. After obtaining this information, the trustees determine whether the pensioners of such employers are eligible for benefits under the Plan's eligibility criteria. The trustees employ a staff of auditors to conduct such "no longer in business" investigations, and 122 active cases were under investigation as of July 31, 1988. Respondent UMWA, which is aware of and cooperates with these investigations, has never questioned the trustees' discretion in conducting these investigations and making the necessary eligibility determinations. The UMWA has also never questioned why, if the contract truly requires that the Plan cover all pensioners whose last employer does not

pay for them, the trustees even bother to conduct the "no longer in business" inquiries.

D. The District Court's Decision Is Contrary to Those of Other Courts Construing the Trustees' Authority under the Plan.

The trustees' discretionary authority has been acknowledged by the Fourth Circuit. In *District 17, District 29, Local Union 7113 v. Allied Corp.*, 765 F.2d 412 (4th Cir.) (*en banc*), *cert. denied*, 473 U.S. 905 (1985), *rev'g* 735 F.2d 121 (1984), the court held that "[t]he 1974 Benefit Trust empowers the Trustees to interpret the provisions of the Trust." 765 F.2d at 416 (citing Article III of the trust document). And the following finding of fact by the district court in that case was left undisturbed on appeal:

> *Pursuant to their authorization to administer the 1974 Trust, the Trustees adopted a "Question and Answer" (hereafter Q&A) system as a basis for establishing uniform rules of interpretation of the terms of the 1974 Trust to be used in deciding future questions of the 1974 Trust's responsibility.* Pursuant to this system, the Trust's staff asked questions and proposed answers for consideration by the Trustees. After its adoption by the Trustees, a Q&A is considered by the BCOA and the UMWA to be *a final and binding interpretation of the terms of the Article XX* of the appropriate National Bituminous Coal Wage Agreement and of the pertinent provisions of the 1974 Trust.

735 F.2d at 131 (emphasis added).

Similarly, in *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989), which involved the UMWA 1974 *Pension Plan*, the Fourth Circuit held that there was "no question" that the trustees of the Pension Plan (who also serve as trustees for the 1974 Benefit Plan) exercised "discretionary authority" over eligibility determinations and that therefore an abuse of discretion standard ap-

plies to their eligibility decisions. Significantly, the court in *Boyd* relied on the trustees' authority to promulgate rules and regulations, and to make final eligibility determinations, the same kinds of authority granted to the trustees of the 1974 Benefit Plan. *Id.* at 59; *see also Richards v. UMWA Health and Retirement Fund*, 895 F.2d 133, 135 (4th Cir. 1990) (applying arbitrary and capricious standard based on "broad discretionary authority" granted trustees of UMWA pension plan). *Boyd* and *Richards* were both decided after *Firestone*, and both explicitly followed this Court's ruling.

E. The District Court's Decision Highlights the Confusion in the Courts of Appeals in Applying the Standards Established in *Firestone*.

The district court's decision applying a *de novo* standard of review conflicts with the decisions of several courts of appeals applying *Firestone* to plans with language substantially similar to that at issue here. For example, in *de Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), the Fourth Circuit applied an arbitrary and capricious standard based on plan language giving plan administrators the power "to determine all benefits and resolve all questions pertaining to the administration, interpretation and application of Plan provisions . . . ." *Id.* at 1186. Relying on this Court's *Firestone* decision, the *de Nobel* court stated that it "need only appear on the face of the plan documents" that the plan fiduciary has the power to settle disputed eligibility questions or to construe doubtful provisions of the plan itself. *Id.* at 1187. Noting that the Fourth Circuit had previously held that language far less broad than that involved in *de Nobel* vested in plan fiduciaries a sufficient measure of discretionary authority to justify an arbitrary and capricious standard, the court ruled that it could not disturb the challenged benefits denial except upon a showing of procedural or substantive abuse. *Id.* at 1186-87. In response to the plaintiffs' argument that the plan lan-

guage did not grant the trustees sufficient authority to resolve benefits eligibility disputes or to interpret doubtful plan provisions, because it did not contain the word "discretion," the court stated:

> We perceive no principled basis, however, on which we could engage in semantic hair-splitting of that sort. There are obviously no magic words required to trigger the application of one or another standard of judicial review. In this setting, it instead need only appear on the face of the plan documents that the fiduciary has been "given [the] *power* to construe disputed or doubtful terms"—or to resolve disputes over benefits eligibility—in which case "the trustee's interpretation will not be disturbed if reasonable."

Id. at 1187 (quoting *Firestone*, 109 S. Ct. at 954).

In *Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522 (5th Cir.), *cert. denied*, 110 S. Ct. 152 (1989), the Fifth Circuit applied an arbitrary and capricious standard based on language in a retirement plan granting an administrator the power "to determine all questions arising" in the administration of the plan, "including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests." *Id.* at 524. The Fifth Circuit reasoned that the plan's unambiguous language mandated deference to the plan administrators. *Id.* at 524-25. The *Lowry* court stated that "[u]nlike in *Bruch*, there is 'evidence that under' the trust instruments 'the administrator has the power to construe uncertain terms [and] that eligibility determinations are to be given deference.'" *Id.* at 525 (quoting *Firestone*, 109 S. Ct. at 954).[11]

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[11] Other decisions deferring to fiduciaries' eligibility determinations based on plan language giving the fiduciary power to construe disputed terms or to resolve eligibility disputes include: *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 427 (4th Cir. 1990) (applying abuse of discretion standard based

By contrast to this substantial line of cases applying an abuse of discretion standard when fiduciaries have authority to make eligibility determinations or to construe plan provisions, a second line of post-*Firestone* authority applies *de novo* review based on factors other than those deemed appropriate in *Firestone*. Some of these cases focus not on the extent of the fiduciaries' authority but rather on the particular issue of eligibility raised by the applicant before the court.

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on plan language imposing on the plan administrator the duty "to interpret and construe the provisions of the Plan and to make regulations which are not inconsistent with the terms thereof"); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990) (applying arbitrary and capricious standard based on plan language giving the administrator authority to "administer these Pension Rules and . . . decide all questions arising out of and relating to the administration of these Pension Rules" and stating that the decisions of the administrator "shall be final and conclusive as to all questions of interpretation and application of these Pension Rules and as to all other matters arising in the administration thereof"); *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137 (11th Cir. 1989) (arbitrary and capricious standard applied to decisions of administrator given authority to make final and conclusive determinations in the administration of the plan and to interpret the provisions of the plan); *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1924 (1990) (characterizing as "great discretion" plan language giving administrator authority to interpret the plan and to determine all questions arising in the administration, interpretation, and application of the plan); *Batchelor v. International Brotherhood of Elec. Workers, Local 861*, 877 F.2d 441, 443 (5th Cir. 1989) (arbitrary and capricious standard applied under plan providing, *inter alia*, that the trustees had "full and exclusive authority to determine all questions of coverage and eligibility"); *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989) (arbitrary and capricious standard applied to trustees given "full and exclusive authority to determine all questions of coverage and eligibility" and "full power to construe the provisions of [the] Trust"); *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (arbitrary and capricious standard applied to decisions of plan administrator with power to determine "which Employees are eligible to participate in the Plan").

For example, in *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989), the court applied a *de novo* standard of review despite plan language granting the trustee "all powers and duties necessary or appropriate to operate and administer the Plan, including, but not limited to the following specific functions: (1) to act on applications for benefits; and (2) to determine eligibility, service, earnings, and other questions." *Id.* at 1077. The issue facing the trustee in that case was whether an employee met specific eligibility requirements for early retirement laid out in the plan itself (attainment of minimum age and years of service, and agreement of the employer and the employee that the employee's retirement was in their mutual interest). *Id.* at 1076. Because the particular issue facing the trustee did not require it to exercise discretion, the court ruled that the trustee's decision was subject to *de novo* review. *Id.* at 1079. The *Dzinglski* court apparently took the anomalous view that the decision of a fiduciary or administrator deserves more deference when it is difficult than when the decision is easy.

In *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), the Eighth Circuit required *de novo* review despite plan language granting the plan trustees final authority to determine all matters of eligibility. *Id.* at 188. Apparently looking for "magic words" in the plan language expressly vesting the trustees with discretionary authority to determine benefits eligibility *and* to construe the terms of the plan, the *Baxter* court stated:

> Language requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan. . . . Paragraph 16.01 of the Fund's plan provides that the trustees have the final authority to determine all matters of eligibility for the payment of claims. As noted above, this section

> merely describes the trustees' mandatory role in accepting or rejecting claims submitted to the Fund. It does not grant to the trustees authority to construe ambiguous terms. We have carefully reviewed the plan and could find no other provision in the plan specifically giving the trustees the discretionary power to interpret the meaning of its subrogation clause. Thus we hold that the Baxters' claim must be reviewed under the *de novo* standard of *Bruch*.

Id. See also Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288 (11th Cir. 1989) (applying *de novo* standard despite administrator's authority to make initial eligibility determinations according to the terms of the plan).

These decisions, like the district court's decision here, are in direct conflict with both *Firestone* and the substantial precedent developed thereunder, which require only that it "appear on the face of the plan documents that the fiduciary had been 'given [the] *power* to construe disputed or doubtful terms'—or to resolve disputes over benefits eligibility—in which case 'the trustee's interpretation will not be disturbed if reasonable.'" *de Nobel*, 885 F.2d at 1187 (quoting *Firestone*, 109 S. Ct. at 954).

II. REVIEW IS NEEDED TO PREVENT COURTS FROM USURPING THE ROLE OF TRUSTEES AND MODIFYING THE ELIGIBILITY CRITERIA OF EMPLOYEE BENEFITS PLANS.

A. Assuming that Abuse of Discretion Is the Appropriate Standard of Review, the Trustees Did Not Abuse Their Discretion Here Because It Cannot Be an Abuse of Discretion to Follow the Plan's Written Eligibility Criteria.

BCOA submits that, as a matter of law, the trustees did not abuse their discretion by following the plan's "no longer in business" eligibility criteria, and by making their eligibility determinations consistent with those criteria. Indeed, Section 504(a)(1)(D) of ERISA *re-*

quires trustees as fiduciaries to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." App. 64a. To hold that the trustees abused their discretion or acted in an arbitrary and capricious manner under these circumstances is a radical and incorrect departure from governing law.

The district court even went so far as to state that the no-longer-in-business inquiry set forth in the contract and trust document, and followed by the trustees, was "irrelevant" to the determination of whether the pensioners in this case were eligible for benefits. *See* Finding 48, stating that "the financial status of these employers is simply irrelevant to a determination of health benefit entitlement." App. 30a. The district court recognized that by following the no-longer-in-business test, some pensioners would not be receiving health benefits from either their last employer or the Plan. So the court, presumably motivated by laudable social goals, simply disregarded the Plan's written eligibility limitations, overturned the trustees, and pronounced everyone eligible for benefits under the Plan whenever their last employer, for whatever reason, does not provide health benefits for them.

The district court's ruling is also contrary to this Court's decision in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). In *Robinson*, this Court unanimously held that the trustees of the UMWA 1950 Benefit Plan (the same trustees who administer the 1974 Benefit Plan) are obligated both by federal law and by the common law of trusts to enforce eligibility requirements as written in the governing trust document. 455 U.S. at 573-74.

In *Robinson*, widows of coal miners sued the trustees of the UMWA 1950 Benefit Plan to set aside a collectively bargained benefits eligibility provision that provided greater health benefits to widows of pensioners than to widows of miners who were pension-eligible but still

working at the time of their death. The D.C. Circuit held the distinction discriminatory and in violation of federal law because the trustees could not reasonably explain the distinction between the two groups of miners' widows. *Robinson v. UMWA Health and Retirement Funds*, 640 F.2d 416, 423, 424 (D.C. Cir. 1981).

This Court reversed, holding that federal law does not impose a standard of reasonableness on employee benefit provisions. The Court explained:

> As long as [eligibility] conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective-bargaining agreement. . . . [W]hen neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract.

455 U.S. at 575-76.

In a purported attempt to follow *Firestone*, the lower court in this case has disregarded the Court's prior decision in *Robinson*. Under the guise of *Firestone*, the lower court has discarded the Plan's written eligibility rules and imposed its own standard of fairness or reasonableness on the trustees' eligibility determinations.

The district court's application of *Firestone* creates the same mischief that this Court tried to remedy by its decision in *Robinson*. Federal courts have not been granted a roving commission to review the eligibility criteria of employee benefit plans for fairness or reasonableness. Most collectively bargained employee benefit plans (including the plan here) are the result of hard-fought compromises between labor and management. Neither side typically gets all that it wants, but their agreement is valid and binding on both parties. Trustees are obligated by federal law to adhere to such agreements, and it cannot be arbitrary and capricious to do so.

B. Review by This Court Is Necessary to Protect Collectively Bargained Employee Benefit Plans.

The district court's decision establishes a dangerous and unwarranted precedent for judicial intrusion into the substantive terms of employee benefit plans. By venturing beyond the plain meaning of the Plan's written eligibility criteria, the court invites disaster. Applicants for benefits will be less likely to accept adverse eligibility determinations, even when they are required by the written terms of governing trust documents. Any party denied benefits will be encouraged to seek judicial review of the fiduciary's decision, and parties will seek through litigation benefits that they were unable to obtain through negotiation at the bargaining table.

This case is a good example of the disastrous consequences that can occur in such a situation. Here, the parties negotiated a multiemployer health benefits plan for a discrete group of coal miners who had retired from the mines and whose last employer went completely out of business. The Plan was financed solely by contributions from employers that were still in business and signatory to a contract with the UMWA. To prevent financially viable employers from dumping their retirees into the Plan, for payment by the remaining employers, BCOA negotiated restrictive "no longer in business" eligibility language. This restrictive language was negotiated to ensure that the purpose of the trust would not be abused, and to ensure that BCOA member companies would not be required to pay for the retiree health costs of their competitors.

The Plan's trustees properly interpreted and applied the Plan's restrictive eligibility criteria. As a consequence, some pensioners were denied benefits from the Plan. But when these pensioners challenged the trustees' determinations in federal court, the Plan's eligibility restrictions were cast aside, and the Plan was converted into an all-purpose "safety net" for any pensioner whose last employer has ceased providing health benefits.

As a consequence, the number of beneficiaries in the Plan has increased dramatically. The increase in the number of beneficiaries, of course, has greatly increased the Plan's expenses. The trust's income, which is derived from contributions by signatory employers, was never geared to pay for all of these unintended beneficiaries. As a result, the Plan has run out of money and has initiated litigation against BCOA to increase the rate at which employers contribute to the Plan. *UMWA 1974 Benefit Plan and Trust v. BCOA*, Civ. No. 90-0674-TPJ (D.D.C.).

Moreover, the funding crisis has attracted the attention of the highest levels of both the executive and legislative branches of the federal government. In Congress, legislation has been introduced in an effort to improve the Plan's funding. *See* 135 Cong. Rec. S16546 (daily ed. Nov. 21, 1989) (statement of Sen. Rockefeller). In addition, at the Cabinet level, Secretary of Labor Elizabeth Dole has formed an Advisory Commission to study the problem. *See* 55 Fed. Reg. 9228 (March 12, 1990).

In summary, the district court's decision is an improper and impermissible attempt to substitute the district court's judgment for that of the Plan's trustees. The court's failure to defer to the trustees' eligibility determinations is particularly pernicious in the circumstances of this case. As a result of this decision, any employer that does not want to pay for the health costs of its retirees will simply wait until the contract expires, go nonsignatory or nonunion, and then dump its retiree health costs into the Plan, for payment by the remaining signatories. This, of course, will add increased costs to the Plan, decrease the number of signatory employers to pay for these costs, and ultimately lead to the Plan's demise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1990

APPENDICES

APPENDICES

APPENDIX A

Judgment Order of Court of Appeals
(April 9, 1990)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3734

UNITED MINE WORKERS OF AMERICA
INTERNATIONAL UNION, an unincorporated association
by THOMAS RABBIT, Trustee ad Litem

DISTRICT 4, UNITED MINE WORKERS OF AMERICA
an incorporated association by James Kelly,
Trustee Ad Litem

LOCAL UNION 1313, UNITED MINE WORKERS OF AMERICA,
an incorporated association by Joe Dirda,
Trustee Ad Litem

As Representatives of their Members who are
pensioners of the MENALLEN COKE COMPANY

v.

MAX NOBEL, individual and
MENALLEN COKE COMPANY, a partnership and the
UNITED MINE WORKERS OF AMERICA
1974 BENEFIT PLAN AND TRUST
(D.C. Civil No. 86-2638)

BOARD OF TRUSTEES OF THE
UNITED MINE WORKERS OF AMERICA 1974
BENEFIT PLAN AND TRUST, JOSEPH P. CONNORS, SR.,
DONALD E. PIERCE, JR., WILLIAM MILLER,
WILLIAM D. JORDAN, and PAUL R. DEAN, as Trustees
THOMAS SAGGAU

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association; and VENANZIO VITALI, JOHN C. ROLAND, ALEXANDER J. PLESS, WALLACE M. BERRYHILL, GEORGE L. FARRIS, ROBERT B. MILES, SR., HOWARD R. MARTIN, DANIEL KERI, DONALD E. SHAFFER, CHARLES C. GEYER, JOHN K. STODDARD, HENRY F. OKLER, CARL E. KLINK, HAROLD E. MILLER, HERBERT C. HOOVER, MARTIN WARREN, HOLLY MILLER, GEORGE C. VAHALIK, individually and as representatives of a class of similarly situated individuals
(D.C. Civil No. 88-545)

J. KNAPIK, ELMER J. KNOPSNYDER, JOSEPH J. KOCHINCKY, CLAIR F. KOONTZ, STANLEY KOPCZYH, NICK KORINCHANK, JOHN KOSIS, MARGARET KOST, CLARE R. KOWALSKI, CASIMIR J. KOWARDY, JOHN L. KRISE, JOHN KRISKO, JOHN KRIVACSY, MICHAEL J. KRUPA, PETER J. KUDLAWIEC, PETER KUTSICK, JOSEPH KUZEK, JOHN KWAPIK, EDWIN P. LANDIS, JAMES W. LANE, JOHN J. LASH, IRVIN PAUER, HARRISON D. LEARN, WILLIAM LEE, EDWIN P. LEGO, MORRIS LEGROS, CLYDE KEPLEY, RALPH D. LEWIS, FRANCIS A. LIGDA, ROY LINDENBERG, GEORGE E. LOCKARD, WILLIAM E. LORENSO, FRED A. LUDWIG, PAUL J. MALICKY, MERLE W. MALLOY, AUGUST F. MANIFEST, JULIUS MANIFEST, DWAYNE O. MANSBARGER, JOSEPH J. MARCHITELLI, JOSEPH MARDULA, HARRY C. MARIS-

KAWISH, ANGELO J. MARRA, HOWARD R. MARTIN, JOSEPH G. MARUSA, TONY MASTALER, STANLEY A. MATTIS, METRO MAZURAK, ROLE MCMASTERS, GEORGE A. MCMULLEN, JOSEPH C. MCMULLEN, MIKE A. MERCURIOM, JOSEPH J. MESOROS, STEVE MESOROS, VINCENT G. MIHOERCK, BARBARA A. MILLER, BRUCE MILLER, DONALD J. MILLER, HAROLD E. MILLER, PAUL MILLER, RAY A. MILLER, JOHN MINO, GEORGE F. MITCHELL, JOHN E. MONTGOMERY, ENRICO MOROM, HARRY J. MORSE, JOHN R. MOYER, EUGENE H. MURPHY, LEWIS MUSSO, CLYDE A. MYERS, CLAYTON B. NAGLE, FRANK M. NATARIAN, STANLEY NIEMIEC, HELEN OBLINSKY, HENRY F. OKLER, JEANNETTE ONUFRO, WILLIAM J. OPDENHOFF, JOHN OROSZ, JOSEPH PACSAI, HARRY A. PAINTER, ARCHIE J. PANARO, RICHARD N. PASSMORE, HOMER D. PAUL, CLAIR L. PEACOCK, COURTLAND R. PEACOCK, RALPH PERSUHN, GEORGE PETRO, JOHN PETRO, JOHN PETRUSKA, HELEN PETYAK, DONNA J. PISARICK, STEVE PLASO, ALEX J. PLESS, JOHN T. PLESS, MERLE R. PLETCHER, FREDERICK F. PODORNEY, DOROTHY A. PONTANI, JOSEPH W. POTONIC, WILLIAM PRANDI, JOSEPH S. PRESTO, JAMES R. PROCE, STANLEY PRZYROCKI, MIKE PUZAK, LLOYD L. QUEER, JULIAN J. QUEUY, EDWARD R. RAJNISH, JOHN J. RANISH, GEORGE RAYNISH, BUD J. REARICK, IVAN REARICK, STEPHEN REVAK, RALPH J. RHOADES, JAMES W. RICHEY, RICHARD J. REIGER, JAMES E. RINGLER, FRANK J. ROCK, JOHN C. ROLAND, ALEX RUDDOCK, ROSE L. RUMMEL, LEONARD RUTKA, TOM SACKIE, ALEXANDER SAGE, DOROTHY J. SAMOLE, PAUL B. SCHIRF, ROBERT N. SCHROCK, ADAM SCLESKY, STANLEY J. SCRAFIN, WILLIAM P. SEMELSBERGER, STANLEY SEMUSKIE, LOUIS SHABICK, DONALD E. SHAFFER, JOSEPH R. SHEPOSH, WILMER A. SHERRY, MARTIN T. SHOLTIS, HARRY L. SIMMERS, JOHN SIMON, DONALD L. SINCLAIR, DOROTHY L. SINCLAIR, STEVE SINGEL, STEVE SIROCHMAN, EDWARD P. SITOSKY, LOUIS SLOVIKOSKY, EDWARD M. SMITH, EMERY R.

SMITH, HARRY W. SMITH, LEONARD R. SMITH, PAUL J. SMYCHYNSKY, FRANK D. SOLNOSKY, ANDREW F. SOLTIS, SYLVESTER J. SPONSKY, WILLIAM C. SPOTTS, ROBERT G. STAFFORD, JOSEPH L. STANEK, STEVE J. STANO, FRANK STEEL, JOHN J. STEELE, JOHN J. STEFULA, PHLIP L. STEGNER, JOHN W. STEWART, LOUISE STINE, JOHN K. STODDARD, DONALD L. STOUT, CHARLES J. SUEKONIS, MIKE SUSICK, NORMAN W. SWARD, JOSEPH A. SZYMALA, GENO J. TAGLIATI, PETER G. TANDARIC, JOSEPH A. TARANTO, FIELDING C. TATTERSM, RICHARD B. TEKLINSKY, GEORGE TERLION, GEORGE M. THOMPSON, JOHN Z. THOMPSON, ROBERT THURMAN, FRANK TONCINI, JOE TOROK, ERNEST O. TRAVENY, EVELYN TRETINIK, JOHN W. TRISSLER, GVERINO TROMBI, SAMUEL UMBAUGH, INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT 2 AND DISTRICT 5, UNITED MINE WORKERS OF AMERICA, and DONALD ABRAMS, MARTIN L. ABRAMS, PETER P. ABROMOVICH, DOMINICK S. ADAMO, THOMAS R. AGER, ALFRED F. ANDERSON, KENNETH R. ANDERSON, OWEN ARNOLD, GEORGE AROTIN, JOHN W. ASKEW, ARTHUR C. BAKER, EARL P. BAKER, FLOYD W. BAKER, JOHN W. BALL, STANLEY A. BARAN, EDWARD N. BEATTY, NORMAN BERZONSKY, PAUL J. BILLS, EUGENE BLICK, PETE BOGGETTA, WILLIAM D. BONIN, HARRY R. BORING, WILLIAM J. BORING, RICHARD B. BOWSER, SAMUEL P. BOWSER, RICHARD F. BOYER, RICHARD R. BRADFORD, MARSHALL L. BRADLEY, DONALD A. BRANT, JAMES C. BRANT, JOSEPH BRYJA, GILDO BUDEL, JAMES L. BURKETT, JOHN BUSHA, PETER BUSHA, ANDREW BUZA, PAUL C. BYRNES, FREDERICK G. CARAMELLINO, THEODORE CASPER, GINO CATTOI, MARIO CATTOI, JOHN A. CAVALLO, STEVE CEROVICH, JAMES CHADWICK, JAMES CHERISH, ANDREW J. CHERNISKY, FRANK CHIDBOX, SUSAN CHIDBOY, JOSEPH A. CICCOTELLI, JOHN A. CIEZOBKA, JOHN R. COLLINASH, JOSEPH COMMOTES, LESTER A. CONRAD, WILLIAM CORDARO, EMERY L.

COWAN, WILLIAM A. CUNNINGHAM, ANDREW G. CUP, JOSEPH J. CUP, NICK J. CUP, ROSCOE N. CUP, STEVE S. CUP, JOSEPH M. CYGA, EUGENE CYMBOR, WALTER G. CYRAN, JOHN C. DAVIDSON, HARRY J. DAVIS, LEONARD M. DAVIS, ABRAHAM C. DAVISON, ALLEN DECKER, PRESTON D. DECKER, DOMINIC A. DEFAZIO, TONY J. DEPETRO, GEORGE DERCOTCH, HELEN M. DESALVO, JOSEPH DESALVO, CARL W. DICE, WILLIAM V. DILGRIMS, ANDREW DINDIOS, JOHN DNEASTER, JOHN B. DOMALIK, DANIEL DOMINICK, JOAN DONALDSON, ANDREW A. DRAHANK, CLARE L. DRASS, EUGENE D. DRASS, ARTHUR DRENNING, SHIRLEY DRZAL, WALTER DRZAL, ANDREW J. DUBETCKY, LOUIS DUCCA, STEVE A. DUDASH, LEONARD DUMAN, WALTER D. DUMM, HOWARD P. DUREZ, RAYMOND DURIEZ, SARAH DURIEZ, JOHN S. DVORSKY, ALVIN C. DWORAK, WILLIAM H. EAGLER, RALPH F. EARLEY, IRVIN EASH, JOHN H. ECKMAN, WILLIS P. EVERETTS, MARY FAIDLEY, GERALD FARABAUGH, LETTEO L. FASOLI, ARMANDO FASSIO, FRED FASSIO, ROBERT L. FEIGHNER, STELLA FETTERMAN, ROBERT M. FIKE, RAYMOND E. FISHER, ROLAND E. FLANAGAN, WALLACE FLEMING, EARL J. FLORA, GEORGE FORMISH, WILLIAM J. FRANK, ROY A. FREDLEY, FRANK FRYTAK, ALBERT G. FULLER, CLAIR E. FULMER, JOSEPH D. GALINSKY, MIRIAM GARLITZ, TONEY GATSON, CHARLES G. GEYER, JOHN P. GHEARDI, FRED GILL, JOSEPH GLEYDURA, EVELYN GLINSKY, JOHN GLINSKY, JOSEPH F. GLINSKY, MICHAEL GLUSKO, ALBERT GMEREK, FRANK J. GOMOLKA, ANDREW GORMISH, GEORGE W. GORMISH, JAMES J. GREGGI, ANGELO B. GREGORI, GEORGE T. GREGORY, MICHAEL A. GRESKO, ROBERT G. GRUMBLING, JOHN GURKO, GEORGE HABAS, PEARL HAER, ROBERT S. HALL, ALPHONSE R. HALLER, MICHAEL HAMULA, JOSEPH H. HANGEY, MILLARD R. HANSEN, HELEN HANYOK, JOHN HARVILLA, EUGENE HAUZIE, MIKE J. HAYCISAK, MILTON R. HECKMAN, WILLIAM HICKS, ANDY HINIS, HAROLD H. HINTON,

THOMAS R. HITE, PAUL J. HNATKOWICZ, DARRELL E. HOCKENBERRY, NORMAN HOLLEN, JOHN HOLUPKA, JOSEPH HOLUTA, EDWARD S. HONHUS, DANIEL S. HOOVER, HOWARD M. HOOVER, PAUL V. HROMULAK, MIKE S. HURBOCHAK, JOSEPH G. HUDAK, WILLIAM M. JAMES, ARTHUR E. JODON, WILLIAM JOHNSON, JACK JONES, CHARLES JULOCK, ANN KAMINSKY, MICHAEL P. KARAL, CHARLES KASS, HENRY KAZOR, WALTER C. KELLICHNER, WILLIAM A. KELLY, MIKE KEMOCK, DANIEL KERI, BLAIR M. KIRSCH, EARL R. KLINE, HERMAN J. KLINE, HOWARD J. KLINE, JAMES J. KLINE, THOMAS G. KLINE, TIMOTHY J. KLINE, REID KLINK, WILLIAM DONALD VALAUSI, EUGENE VENESKY, JOHN VISLOSKY, VENANZIO VITALI, JOSEPH J. VOZAR, BENJAMIN R. WAGNER, MARY J. WAGNER, VERONICA K. WALKER, ANTHONY R. WARCHOCK, JAMES J. WARGO, WASCO C. WARHOLIC, DIANE M. WARNER, FRANCIS WARNER, JOSEPH R. WARNER, PAUL WASHINSKY, JOHN WASILKO, KATHRYN WASSAM, THOMAS W. WATKINS, JOHN F. WEAKLAND, NORMAN P. WHITE, WESLEY J. WHITED, IRVIN L. WILLIAMSON, CHARLES F. WOJNO, DELORES WOLFF, ELZIE S. WOODSIDE, FRANCIS M. WYSOCKI, FELIX YABLINSKY, ANDREW YAROSH, WALTER E. YASICK, EDWARD G. YEAGER, DANIEL E. YECKLEY, GEORGE YUKNAVICH, WILLIAM J. ZAJDEL, JOHN J. SALIZNOCK, PETER ZAPOTOCKY, BERNARD ZATORSKY, BERNARD B. ZATORSKY, MARGARET T. SATORSKY, MIKE ZEDEK, NICK ZEDEK, ELNORA ZEMBROSE, RALPH B. ZORN, THOMAS ZRIOKA, EVAN C. ZUPON, JOHN DOE, and MARY DOE

v.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST
(D.C. Civil No. 88-546)

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT SIX, UNITED MINE WORKERS OF AMERICA, GEORGE ANDERSON, Retiree JULIA MCCONNELL, Surviving Spouse and JIMMY EYNON, Disabled Retiree and JOHN and MARY DOE

v.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST (D.C. Civil No. 88-1842)

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. (Intervenor in D.C.)

Appellant

Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh) (D.C. Civil Action Nos. 86-2638, 88-545, 88-546 & 88-1842)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
April 2, 1990

Before: HIGGINBOTHAM, *Chief Judge*, and COWEN and NYGAARD, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. Leon Higginbotham
Chief Judge

Attest:

/s/ Sally Mrvos
SALLY MRVOS
Clerk

APR 9 1990

APPENDIX B

Findings of Fact and Conclusions of Law of the District Court

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UNITED STATES DISTRICT COURT
W.D. PENNSYLVANIA

Aug. 3, 1989

As Amended Aug. 29, 1989

Civ. A. Nos. 86-2638, 88-0545, 88-0546 and 88-1842

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, by THOMAS RABBIT, *Trustee ad litem;* DISTRICT 4, UNITED MINE WORKERS OF AMERICA,
Plaintiffs,

v.

MAX NOBEL, *et al.*,
Defendants.

BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,
Plaintiffs,

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,

Defendants. (Two Cases)

Michael J. Healey, Pittsburgh, Pa., Michael H. Holland, Washington, D.C., John Purcell, Bradley Pyles, and Thomas M. Meyers, for plaintiffs.

H. Yale Gutnick, Pittsburgh, Pa., and Stanley F. Lechner, Washington, D.C., for plaintiff intervener.

Marshall J. Conn, Pittsburgh, Pa., Thomas A. Bowlen, Uniontown, Pa., William F. Hanrahan, and Robert M. Weinberg, Washington, D.C., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ZIEGLER, District Judge.

The instant case presents a straight-forward factual dispute. We are required to determine whether the Bituminous Coal Operators Association agreed to fund the health care costs and other non-pension benefits of pensioners of eight former signatory employers to various National Bituminous Coal Wage Agreements. After consideration of the language of the contracts, the structure, bargaining history, and the direct and circumstantial evidence of record concerning the intent of the parties, we hold the evidence preponderates that the BCOA agreed to fund the health benefits of the individual plaintiffs for the term of the agreement to gain acceptance of the National Bituminous Coal Wage Agreement of 1988 by the United Mine Workers of America. We further hold that

the decision of the Trustees of the 1974 Benefit Plan to deny benefits to the individual plaintiffs was arbitrary and capricious, and that the Trustees are precluded from re-litigating in this court the definition of "no longer in business" which was resolved in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988). The 1974 Benefit Plan is required to provide health care and other non-pension benefits where, as here, a retiree's last signatory employer is no longer a signatory to the National Bituminous Coal Wage Agreement. Judgment will be entered for the International Union, United Mine Workers of America, Districts 2, 4, 5 and 6, the individual plaintiffs and the class, against the Bituminous Coal Operators' Association, Inc. and the United Mine Workers of America 1974 Benefit Plan and Trust.

(1) The individual plaintiffs at civil action Nos. 86-2638, 88-546 and 88-1842, and the individual defendants at No. 88-545, are retired or disabled coal miners, surviving spouses or dependents of retired or disabled coal miners, who were last employed in the coal industry by Barnes & Tucker Coal Company, Y & O Coal Company, Menallen Coal Company, G.M. & W. Coal Company, Marmon Coal Company, Penn Pochontas Coal Company, Canterbury Coal Company or Coalite, Inc.

(2) The United Mine Workers of America International Union, Districts 2, 4, 5 and 6, and Local 1313, United Mine Workers of America, are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act, 29 U.S.C. § 152(5). These organizations were the collective bargaining representatives of the employees of the eight employers in dispute.

(3) The Bituminous Coal Operators' Association, Inc. (BCOA) is a multi-employer bargaining association that currenty represents approximately 16 companies in collective bargaining with the United Mine Workers of

America (UMWA). The BCOA and the UMWA negotiate the National Bituminous Coal Wage Agreement (NBCWA), a collective bargaining agreement that governs the terms and conditions of employment for the coal miners of the BCOA-member companies and companies that sign "me too" agreements with the UMWA.

(4) The BCOA has for approximately 40 years negotiated the national agreement with the UMWA. National Bituminous Coal Wage Agreements were executed in 1950, 1971, 1974, 1978, 1981, 1984 and 1988.

(5) The UMWA 1974 Benefit Plan and Trust is an employee welfare benefit plan within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(1). The plan is an irrevocable trust created, perpetuated and funded pursuant to the National Bituminous Wage Agreements of 1974, 1978, 1981, 1984 and 1988. In general, the 1974 Benefit Plan provides health and other non-pension benefits to miners who retired after January 1, 1976 and who meet certain eligibility criteria.

(6) Jurisdiction is based on the Employee Retirement Income Security Act, 29 U.S.C. § 1132, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and 28 U.S.C. § 1331. Venue properly lies with this court under 29 U.S.C. § 1132(e)(2) and the parties do not contend otherwise.

(7) The International Union, Districts, Local 1313, and the individual plaintiffs, who are or were vested in a pension under the 1974 Pension Plan and the spouses or dependents of such persons, seek injunctive relief to compel the 1974 Benefit Plan to provide health and other non-pension benefits, pay all unpaid medical bills and establish an escrow fund to insure payment of such benefits. In seeking equitable relief, plaintiffs bear the burden of proving by a preponderance of the evidence (a) success on the merits, (b) irreparable harm, (c) defendants will

not suffer substantial harm from the grant of an injunction and (d) the public interest, if any. The parties stipulated that the instant proceeding shall constitute a trial on the merits pursuant to Rule 65(a)(2).

(8) Plaintiffs contend that the individual plaintiffs, who are retired or disabled miners (or their dependents), were last employed as coal miners for one of eight former signatory employers to various National Bituminous Coal Wage Agreements. The wage agreements from 1974 to the present guaranteed health and non-pension benefits to all pensioners for life when benefits were not paid by their last employer. When the eight employers failed to execute the NBCWA, the BCOA agreed to fund the benefits of the plaintiffs for the period of the 1988 agreement to prevent cessation of benefits because their former employers were no longer legally obligated to do so. Further, plaintiffs contend that the decision of the 1974 Benefit Plan to deny benefits to the individual plaintiffs was arbitrary and capricious because the Trustees (a) misconstrued the intent of the UMWA and the BCOA; (b) improperly interpreted the plan and trust documents; and (c) failed to enforce various contractual provisions to require the BCOA to fund the benefits. Finally, plaintiffs argue that the 1974 Benefit Plan is precluded from litigating in this court the phrase "no longer in business" of Article XX of the National Bituminous Coal Wage Agreements and Article IIE.4 of the 1974 Benefit Plan and Trust following the decision in *District 29, United Mine Workers of America v. 1974 Benefit Plan & Trust*, 826 F.2d 280 (4th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.C. 1111, 99 L.Ed.2d 272 (1988).

(9) Article XX(c)(3)(ii) of the National Bituminous Coal Wage Agreement of 1988 provides as follows:

> For purposes of determining eligibility under the 1974 Benefit Plan and Trust, an Employer is considered to be "no longer in business" only if the Employer:

(a) has ceased all mining operations and has ceased employing persons under this Wage Agreement with no reasonable expectation that such operations will start up again; and

(b) is financially unable (through either the business entity that has ceased operations as described in subparagraph (a) above, including such company's successors or assigns, if any, or any other related division, subsidiary, or parent corporation, regardless of whether covered by this Wage Agreement or not to provide health and other non-pension benefits to its retired miners and surviving spouses.

Article IIE.4 of the 1974 Benefits Plan and Trust contains the eligibility test which refers to Article XX of the 1978, 1981 or 1984 wage agreements.

(10) The 1974 Benefit Plan filed a civil action for a declaratory judgment to determine

whether plaintiffs are responsible for providing health benefits to members of the Class under the Plan where they fail to satisfy the eligibility requirement for benefits under Article II of the Plan document in effect on and after June 7, 1981, because their last signatory employers do not satisfy the definition of 'no longer in business' set forth in the Plan document.

(11) The BCOA intervened and filed a complaint in the action filed by the Trustees of the 1974 Benefit Plan contending that (a) a class is properly certifiable under Rule 23(b)(2); and (b) each last signatory employer of the individual employees, since June 7, 1981, possessed one or more of the following characteristics:

(i) it continues or continued to engage in the business of mining coal; or

(ii) it continues to employ persons under wage agreements similar to the NBCWA; or

(iii) it has temporarily ceased coal mining operations with a reasonable expectation that such operations will resume; or

(iv) it is financially able to provide to pensioners the health benefits specified in the NBCWA (or similar agreement) to which it was signatory, or has a related division, parent or subsidiary corporation or successor or assign which is financially able to do so.

(12) The eight employers of the individual plaintiffs were signatories to a national agreement. Menallen Coal Company, G.M. & W Coal Company, Marmon Coal Company, Penn Pocahontas Coal Company, Canterbury Coal Company and Coalite, Inc., were last signatories to the 1981 Agreement. Barnes & Tucker Coal Company and Y & O Coal Company were last signatories to the 1984 Agreement.

(13) Menallen ceased providing health benefits to its pensioners on October 1, 1985, Canterbury on August 5, 1985, G.M. & W., Penn Pocahontas and Marmon in April 1987, and Barnes and Tucker and Y & O on January 31, 1988. All of these employers, except Canterbury, have been assessed withdrawal liability by the UMWA Health and Retirement Funds based on the fact that they are no longer signatories to a collective bargaining agreement with the UMWA and are no longer obligated to contribute to the pension plans.

(14) The National Bituminous Coal Wage Agreement of 1950 established a trust known as the "United Mine Workers Welfare and Retirement Fund of 1950" for the purpose of providing health care and retirement benefits to members of the United Mine Workers, including active and retired miners and their dependents. The trust was the successor to an earlier health and welfare fund established in 1947 during negotiations between the United Mine Workers and the Secretary of the Interior.

(15) The Welfare and Retirement Fund of 1950 was governed by a board of three trustees, one appointed by the union, one by the BCOA, and one neutral trustee. It was funded by a royalty on the tonnage of coal produced or purchased by signatory employers. Between 1950 and 1974, the nature and level of benefits provided to active and retired mine workers was determined by the trustees of the 1950 Fund, who had complete discretion to determine the level of benefits and eligibility requirements. The trustees acted by means of formal resolutions. Pension benefits for retired miners were provided beginning in 1947, under the previous trust, and health benefits were provided to retired miners beginning no later than 1950. The pension and health benefits for retired miners were provided throughout the life of the miner. The eligibility of the retired miner to receive pension and health benefits from the 1950 Fund was not affected by whether the last employer ceased operations, went out of business, or failed to become signatory to successor agreements.

(16) In 1974, the UMWA and the BCOA agreed to restructure the trust to comply with ERISA, place the trust on a more sound financial basis, and permit more generous pensions based upon length of service for future retirees. The National Bituminous Coal Wage Agreement of 1974 replaced the 1950 Fund with four separate trusts. The 1950 Pension Plan and Trust and the 1950 Benefit Plan and Trust continued to provide pensions and health benefits to pensioners, dependents, and disabled mine workers who retired prior to January 1, 1976. The 1974 Pension Plan and Trust was to provide pension benefits to miners who retired after January 1, 1976, and the 1974 Benefit Plan and Trust was to provide health benefits and other non-pension benefits (including life insurance) to active mine workers and retirees who were receiving pensions from the 1974 Pension Plan and Trust.

(17) The UNWA and the BCOA also agreed during the course of the 1974 negotiations to extend lifetime health benefits to widows of retired mine workers, including the widows of miners who died prior to the 1974 Agreement, but did not extend lifetime benefits to a smaller group of widows of mine workers who had been working at the time of their death, although they were pension-eligible. *See United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982).

(18) For the first time, the parties to the 1974 Agreement also agreed to define and set forth in the collective bargaining agreement the benefits to be provided to miners, pensioners, and their dependents. The parties negotiated the level of benefits and the eligibility requirements for those benefits. The benefits to be provided were summarized and placed in the agreement by including in Article XX a "Summary of Principal Provisions, UMWA Health and Retirement Benefits." The Article provided that, with respect to retired miners under both the 1950 Pension Plan and the 1974 Pension Plan, the retired miner would retain a health Services card "until death" and a widow would retain a card until her death or remarriage. "Any pensioned miner covered in this Plan will retain his Health services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage." In addition, "a miner who was permanently disabled as the result of a mine accident after May 29, 1946 . . . will be entitled to retain his Health Services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage." *See* NBCWA of 1974, Article XX, Health and Retirement Benefits, ¶¶ 1 and 5, pp. 31-32.

(19) In 1977, the trusts experienced financial difficulty due to insufficient income, wildcat strikes, and increased costs for health care, and the trustees instituted a system of co-payments for health benefits, which continued until

the expiration of the 1974 Agreement. Health benefits were terminated in December, 1977, when the trusts were unable to pay benefits.

(20) The 1974 agreement expired and a national strike ensured from December 5, 1977 to March 27, 1978. Three tentative contracts were negotiated in February and March, 1978. The first was rejected by the bargaining council of the Union in February, 1978. The second was rejected by the members of the UMWA in a ratification vote in early March, and the third was ratified and signed on March 27. During the negotiations for the 1978 agreement, the BCOA proposed to provide health benefits to active miners and retirees in the 1974 Pension Plan through company-sponsored benefit plans, and eliminate the 1974 Benefit Plan. The UMWA sought the restoration of health benefits to previous levels and a guarantee of benefits to avoid future cuts or loss of benefits similar to those experienced in 1977. The Union also insisted that some provision be made to ensure that "orphaned" pensioners who would otherwise lose their benefits would be protected. The parties ultimately agreed that benefits would be provided to active miners and pensioners who retired under the 1974 Pension Plan by individual company plans, but that the 1974 Benefit Plan would be retained as a "safety net" for the purpose of providing benefits to pensioners who would otherwise lose their benefits. The agreement provided that the 1974 Benefit Plan would provide benefits to

> any retired miner under the 1974 Pension Plan . . . who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) is no longer in business.

The term "no longer in business" was not defined. Also, there was no discussion or agreement that any pensioner or groups of pensioners who would have had coverage

under the previous system for health benefits would be excluded from coverage under the new system being implemented.

(21) During the 1978 negotiations, in the process of redrafting the "General Description of Plan Benefits" contained in Article XX of the proposed agreement, the BCOA proposed to eliminate the language contained in the 1974 Agreement that pensioners and disabled miners would retain a health services card "until death" or "for life", and widows "until death or remarriage." The UMWA refused to agree to elimination of the language, and substantially similar language was inserted into the 1978 "General Description", providing that a 1974 pensioner

> . . . will be entitled to retain his health services card for life. Upon his death, his widow will retain a Health Services card until her death or remarriage.

Substantially identical language appears eight times in the General Description of Plan benefits, describing the health benefit entitlement of various categories of pensioners, disabled miners, and surviving spouses, including retirees receiving pensions under the 1950 Pension Plan. The BCOA negotiators understood in 1978 that any contract that removed such language would not be ratified because the membership considered the health services card as a basic benefit. The "for life" language was carried forward without change in the 1981, 1984, and 1988 Agreements.

(22) In the 1978 Agreement, the 1974 Benefit Plan and Trust was funded by a royalty of two cents per hour paid by the signatory employers. All eight of the employers involved in this case were signatory to the 1978 Agreement and contributed royalties to the 1974 Benefit Plan. At least five of the eight were members of the BCOA at the time of the execution of the 1978 Agreement. The 1974 Benefit Plan accumulated a substantial

surplus by the end of the 1978 Agreement, and no additional contributions were required by the signatory employers during the terms of the 1981 and 1984 agreements. The funds accumulated during the term of the 1978 Agreement were sufficient to provide benefits to all "orphaned" pensioners from 1978 to 1988.

(23) The 1978 Agreement required substantial change and redrafting of the plan documents to reflect the change in the delivery system of health care benefits. In order to implement the new system, each pensioner was assigned to his last signatory employer. In some cases, the last employer could not be identified or located. In an effort to ensure that no one would lose their benefits in the transition to the new delivery system, the parties provided that:

> Notwithstanding the above, any Pensioner who was eligible for benefits under the 1974 Benefit Plan as a Pensioner on December 5, 1977, and who is not eligible for benefits under an individual employer benefit plan . . . shall be eligible for such benefits, subject to all other provisions of this Plan.

Contrary to the assertion of the Fund and the BCOA, the settlors did not intend to create to classes of pensioners, i.e., those retiring before December 5, 1977, and those retiring at a later date, and provide a "safety net" for the former but not the latter. We note that the 1974 Benefit Plan has not applied such a test in these cases. The Plan has denied benefits to all pensioners of the eight employers regardless whether they retired before or after December 5, 1977.

(24) Following the 1978 Agreement, the Trustees denied coverage to certain groups of pensioners, among them pensioners from Imperial Coal Company, who were eligible for pensions but did not retire prior to December 5, 1977, and whose employers did not sign the 1978 Agree-

ment. The union-appointed trustee dissented from the decision to deny benefits.

(25) During negotiations for the 1981 Agreement, the BCOA agreed to amendments to the benefit plan to extend benefits to the Imperial pensioners that had been excluded by the interpretation of the Trustees. In those negotiations, the BCOA did not take the position that the Imperial pensioners were not covered in 1978. Roger Haynes, the primary benefits spokesman for the BCOA, conceded that they were intended to be covered in 1978 but "had fallen through a crack." The Union took the position that the Trustees had misinterpreted the intent of the parties.

(26) The Trustees of the UMWA Health and Retirement Funds promulgate written questions and answers to provide standardized responses to the terms of the plan and trust documents. Following the 1978 Agreement, the Trustees adopted Q & A H-16, which defined the terms "no longer in business" and "successor" contained in the agreement.

(27) By 1980, a number of signatory companies ceased operations as economic conditions in the coal industry worsened. The 1978 Agreement, while providing for orphaned pensioners, had failed to anticipate the problem of laid off miners whose last employer was no longer in business. In 1980, the parties entered into a mid-term agreement to allocate up to $2 million from the 1974 Benefit Plan to provide benefits to laid off miners in that situation. The BCOA was concerned that the definition of "no longer in business," adopted by the Trustees, was susceptible of manipulation by employers seeking to dump their obligations on the 1974 Benefit Plan, and proposed language in the $2 million fund agreement to protect the 1974 Benefit Plan from such tactics. The Union agreed to the proposal.

(28) Shortly after the 1980 Agreement, the Trustees applied the new definition in the case of Transport, Inc., where the employer requested that the 1974 Benefit Plan assume responsibility for its laid off employees although it was still signatory to the collective bargaining agreement, financially able to provide benefits, and actually providing benefits pending the decision of the Trustees. The Trustees held that Transport, Inc. was in business and remained obligated to provide benefits to its pensioners.

(29) During the negotiations for the 1981 Agreement, the BCOA proposed incorporating the "no longer in business" language from the 1980 mid-term agreement into the 1981 Agreement. The BCOA negotiators assured the UMWA negotiators that it was not the intent of the proposed change to cause pensioners to lose their benefits, but only to make sure that "there wasn't any way that the irresponsible operators could walk away from their liability." The Union's negotiators accepted those assurances and had no objection to the proposal. The evidence preponderates that the parties intended to protect the 1974 Benefit Plan by insuring that responsible employers fulfilled their obligations to provide benefits, but there was no intent or agreement to create a gap in coverage where certain pensioners would lose benefits because neither the employer nor the 1974 Benefit Plan was obligated to provide them.

(30) Following the 1981 Agreement, the Trustees, over the dissent of Harrison Combs, again interpreted the "no longer in business" language to deny benefits to a group of pensioners that were last employed by Adam Eidemiller, Inc. The parties informed the Trustees that their decision was contrary to their intent and, upon insistence by the Trustees, adopted a formal amendment to the plan which had the effect of including those pensioners in the 1974 Benefit Plan.

(31) Prior to the negotiations for the 1984 Agreement, a panel of the Court of Appeals for the Fourth Circuit decided *District 17, UMWA v. Allied Corporation (Allied I)*, 735 F.2d 121 (4th Cir.1984), and construed the collective bargaining agreement and trust documents to limit the obligation of the employer to provide health benefits to the term of the contract, and placed the obligation on the 1974 Benefit Plan where the employer was no longer obligated to make such payments. At the time of the negotiations, the Allied pensioners were receiving benefits pursuant to court order pending *en banc* hearing by the Court of Appeals, and there were no other groups of pensioners that were not receiving benefits from either the employer or the 1974 Benefit Plan.

(32) During the 1984 negotiations, both parties presented proposals in response to the *Allied* ruling. The BCOA proposed language that all pensioners of employers who sell their operations, without passing the obligation to the purchaser to provide benefits, would be ineligible for benefits from the 1974 Benefit Plan, thereby reversing a portion of the *Allied* ruling. The BCOA also proposed to eliminate the guarantee of benefits in the 1978 and 1981 agreements. The UMWA offered a proposal which would have clearly placed the obligation to provide benefits on the employer beyond the term of the contract, unless the employer passed the obligation to a successor, but also made clear that the benefits were vested lifetime benefits and that the 1974 Benefit Plan was ultimately responsible, if no other party was legally obligated to do so. A second UMWA proposal would have strengthened the notice and related provisions of the successorship clause. The BCOA rejected the Union's proposals because it agreed with that portion of *Allied* which held the obligation of the employer did not survive the expiration of the contract, but disagreed with the part of the decision that placed the obligation on the 1974 Benefit Plan. The BCOA also disagreed that the benefits

were lifetime benefits. The Union rejected the BCOA proposals because they would have left pensioners without health benefits and would have removed the guarantee of benefits. Both proposals of the parties were withdrawn in the latter stages of the 1984 negotiations, and the "no longer in business" language remained unchanged, although the parties did agree to some additional language to address bankruptcy problems and to provide additional notice of transfers of assets where the successorship clause was implicated.

(33) During the term of the 1984 Agreement, a number of additional court decisions construed the "no longer in business" language and the other provisions of the collective bargaining agreement and plan documents. *District 29, UMWA v. Royal Coal Company (Royal I)*, 768 F.2d 588 (4th Cir.1985); *District 17, UMWA v. Allied Corporation (Allied II)*, 765 F.2d 412 (4th Cir. 1985); *Box v. Coalite*, 643 F.Supp. 709 (N.D.Ala.1986), and reaffirmed the holding of *Allied I*, that is, the obligation of the employer to provide benefits does not survive the expiration of the contract.

(34) The Trustees of the Funds, in their capacity as trustees of the 1950 Benefit Plan, also serve as arbitrators of disputes between employers and beneficiaries regarding health benefits, and issue written opinions regarding such disputes. The Trustees have applied the decision in *Allied II* and *Royal I* nationally to such disputes, and have issued 49 decisions holding that the employer is not obligated to provide benefits after the expiration of the agreement. At least four of those decisions involved the employers in this case.

(35) Three other courts construed the language in the contract and plan documents and placed the obligation to provide benefits on the 1974 Benefit Plan. *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust (Royal II)*, 826 F.2d 280 4th Cir.1987); *Schifano v. UMWA*

1974 Benefit Plan and Trust, 655 F.Supp. 200 (N.D. W.Va.1987); *Crockett v. Vecellio & Grogan*, 1987 WL 60303 88-1448 (S.D.W.Va. Feb. 4, 1987).

(36) At the time of the negotiations leading to the 1988 Agreement, both parties were aware of these holdings and the construction that the courts had placed on the provisions of the contract and benefit plans. The Court of Appeals for the Fourth Circuit had denied the 1974 Benefit Plan's petition for rehearing in *Royal II*. The parties were aware that additional beneficiaries would become the responsibility of the 1974 Benefit Plan as a result of *Royal II* and similar decisions. Other companies had indicated an intention to cease employing members of the UMWA and terminate benefits at the expiration of the 1984 Agreement, including Barnes & Tucker and Y & O Coal Company.

(37) The parties discussed the need for additional funding for the 1974 Benefit Plan. The BCOA initially resisted renewing the guarantee of benefits, but ultimately agreed to do so. The BCOA proposed a contribution of five cents per hour to the 1974 Benefit Plan, and ultimately agreed to eight cents, assuming a zero balance at the end of the contract. The Union negotiators had projected that contributions in the range of 18 to 22 cents per hour would be necessary to provide benefits to the potential beneficiaries and maintain the corpus of the trust at the end of the contract. They expressed skepticism that eight cents would be sufficient to provide benefits to the potential beneficiaries over the term of the agreement. The BCOA responded that, since they were guaranteeing the benefits, the UMWA should not be concerned about the contribution rate, and that additional money would be forthcoming if necessary. The BCOA preferred to maximize cost savings by minimizing the initial contribution rate, and providing additional funding under the guarantee clause if necessary. The UMWA also proposed and the BCOA accepted provisions requir-

ing that employers who ceased to contribute to the 1950 and 1974 Benefit Plans pay withdrawal liability to the plans. A substantial number of non-BCOA companies who had signed "me too" contracts and agreed to be bound by the terms of the 1988 NBCWA became bound by those provisions. Due primarily to the fully funded status of the 1950 Pension Plan, the BCOA and other signatory companies received a reduction in labor costs of approximately $2.86 to $2.88 per hour.

(38) The guarantee of benefits contained in the 1978, 1981, 1984, and 1988 agreements included a provision for the BCOA to increase the contribution rate if necessary to maintain the level of benefits. Such increases are binding upon all signatory employers, not just the members of the BCOA. The mechanism has been employed during the term of the 1988 agreement to increase contributions to the 1950 Benefit Plan.

(39) ERISA does not impose any minimum vesting requirement with respect to employee welfare benefit plans, and there is no evidence in the legislative history that Congress intended that health and life insurance benefits, such as those provided by the National Bituminous Coal Wage Agreements, can be terminated at will if the parties agree otherwise. Whether the pensioners at bar are entitled to health benefits as a vested, lifetime benefit depends upon the intent of the parties to the collective bargaining agreement. *International Union, Union Auto Workers v. Yard-Man Inc.*, 716 F.2d 1476 (6th Cir.1983), *cert. denied* 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed2d 234 (1984); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir.1984); *Local Union No. 150A, UFCW v. Dubuque Packing Co.*, 756 F.2d 66 (8th Cir. 1985). If benefits are vested, they may not be altered without the consent of the retirees. *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982); *Allied Chemical and Al-*

kali Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971).

(40) The language of the plan benefits contained in the past five collective bargaining agreements between the UMWA and the BCOA, providing that a pensioner "will be entitled to retain a health services card for life," together with the 25-year history of lifetime benefits prior to 1974, and the testimony of the parties of record establish that the parties intended to provide health benefits to the individual plaintiffs for life. We find that the language confers a right to benefits for the lifetime of the pensioner. *See also District 29, UMWA v. Royal Coal Company*, 826 F.2d at 282-283; *Crockett v. Vecellio & Grogan, supra*, slip op. at 4, *Grubbs v. UMWA 1974 Benefit Plan*, —— F.Supp. ——, 87-2207 (W.D.Ark. Feb. 17, 1989) slip op. at 9-10. Similar language was interpreted to create a vested right to lifetime benefits in *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir.1985). The argument of the BCOA and the 1974 Benefit Plan that the language is irrelevant is unpersuasive, particularly in view of the fact that it was expressly retained in the 1978 agreement when the BCOA sought its removal.

(41) Although the intent to provide lifetime benefits to retirees is unambiguous, the collective bargaining agreemeits and the plan documents are ambiguous concerning whether the employer or the 1974 Benefit Plan is obligated to provide such benefits when the employer is no longer a signatory to the collective bargaining agreement.

(42) There is no persuasive evidence that the parties intended to cause the forfeiture of benefits or to create a gap in coverage where an employer is not legally obligated to provide benefits to these pensioners. Instead, the credible evidence supports the position of the pensioners. To alter the nature of a pension-related benefit which has

been a lifetime benefit for more than 25 years, requires more persuasive evidence than exists of record. Nothing in the collective bargaining agreements, the plan documents or the evidence presented by the BCOA or the Trustees preponderates that the parties intended to deprive these pensioners of benefits.

(43) The evidence preponderates that the purpose of the 1981 amendment to the "no longer in business language" was to prevent employers from avoiding their obligations to their pensioners during the term of the agreement—not to deprive pensioners of their benefits upon the happening of contingencies entirely beyond their control. No other interpretation is consistent with the credible evidence or the fact that the Union agreed to the change, without dissent. We are persuaded that a change of that magnitude would have evoked a concern on the part of the Union. The Union's position is buttressed by the testimony of Roger Haynes in the *Allied* case where he stated, in response to a question concerning whether there could be a whole group of Allied pensioners who would have no coverage whatsoever: "I would be very shocked and surprised if the union would ever agree to that." It is clear that both parties, in adopting the language, presupposed that the employer was obligated to provide benefits and intended to ensure during the term of the agreement that the employer rather than the 1974 Benefit Plan would pay benefits unless unable to do so. Our conclusion is reinforced by the fact that the "no longer in business" clause refers to *signatory* employers, indicating that the 1974 Benefit Plan must provide benefits to retired miners who

> . . . would otherwise cease to receive the health and other non-pension benefits provided herein because the *signatory* employer, including successors and assigns . . . is no longer in business.

A signatory employer is obligated to provide benefits for the term of the contract to which it is signatory regard-

less whether it has any operations covered by the contract, i.e., coal mining operations. The Transport, Inc. case is an example of the intended application of the clause—a signatory employer no longer operating which is financially able to provide benefits, and still under an obligation to do so. There is no support in the record for the contention that the pensioners or the Union purposely agreed to divest vested pension rights in favor of a scheme that would condition receipt of benefits upon the financial condition of an entity that has no obligation to pay benefits.

(44) The evidence preponderates that the parties, in moving from a system where the health benefits were provided solely by the 1974 Benefit Plan to a regime in which individual employers assumed primary liability, intended to change the method of providing health benefits, but we find that they did not intend to create loopholes in the coverage. *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280, 283 (4th Cir. 1987).

(45) Although the 1978 and 1981 Agreements and their associated plan documents are ambiguous concerning whether the employer or the 1974 Benefit Plan was obligated to provide benefits after the expiration of the contract, the agreements had been construed by a number of courts prior to the 1988 negotiations. Without exception, the authorities interpreted the agreements and plan documents to impose the obligation to provide benefits on the 1974 Benefit Plan, and that the employer was no longer obligated to provide benefits after the expiration of the agreement. *District 17, UMWA et al. v. Allied Corporation*, 735 F.2d 121 (4th Cir.1984), *on reh'g en banc*, 765 F.2d 412 (4th Cir.1985); *District 29, UMWA v. Royal Coal Company*, 768 F.2d 588 (4th Cir.1985), on remand, *aff'd District 29, UMWA et al. v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir.1987), *cert. denied* —— U.S. ——, 108 S.Ct. 1111, 99 L.Ed.2d

272 (1988); *Schifano v. UMWA, 1974 Benfit Plan and Trust*, 655 F.Supp. 200 (N.D.W.Va.1987); *Box. v. Coalite*, 643 F.Supp. 709 (N.D.Ala.1986); *Crockett v. Vecellio & Grogan, Inc.*, 88-1448 (S.D.W.Va. Feb. 4, 1987). The Trustees adopted this interpretation with respect to the liability of former employers.

(46) The readoption of the language in the 1988 Agreement confirms that the judicial interpretations correctly represent the intent of the parties.

(47) The appropriate standard of review of the Trustees' decision to deny benefits to these pensioners appears to be *de novo* review. *Firestone Tire and Rubber Co. v. Bruck*, —— U.S. ——, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Nothing in the collective bargaining agreements or plan documents prescribe a more stringent standard. Since the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust. Moreover, assuming that the appropriate test of trustee discretion is the "arbitrary and capricious" standard, as urged by the Trustees, we find that the decision to deny benefits to these pensioners was arbitrary and capricious.

(48) The Trustees interpreted Article IIE.4.b of the Plan documents and Article XX(c)(3)(ii)(b) of the NBCWA to preserve the corpus of the trust at the expense of the intended beneficiaries. The eight former signatory employers at issue have no legal obligation to pay benefits to plaintiffs, as the Benefit Plan conceeds, and therefore the financial status of these employers is simply irrelevant to a determination of health benefit entitlement. As rehearsed, the 1974 Benefit Plan was established to guarantee the payment on non-pension benefits to pensioners, such as plaintiffs, to prevent the hardships to which plaintiffs are exposed. We hold that the Trustees made an erroneous decision on a question of law. *Schifano v. UMWA 1974 Benefit Plan*, 655 F.Supp. 200, 204 (N.D.W.Va.1987).

(49) The concern of the Trustees for the solvency of the trust is misplaced under the circumstances. Article XX(h) of the NBCWA of 1988 provides that the signatory employers will fully guarantee the solvency of the 1974 Benefit Plan with appropriate contributions and "may increase, not decrease, the rate of contributions to the . . . 1974 Benefit Fund . . . during the term of this Agreement." 1988 NBCWA at p. 142. In addition, Article XII of the Plan documents requires that any employer who makes contributions to the 1974 Benefit Plan shall make the contributions that are required by the NBCWA. There can be no dispute that the Trustees have the power and duty to enforce these provisions, if necessary. *See Article* VIII(8) and (9) of the 1974 Benefit Plan; Art. XX(vii)(6) and (10) of NBCWA of 1988.

(50) The failure of a trustee to administer a pension plan in accordance with the governing documents constitutes a breach of fiduciary duty. *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir.1985). Where, as here, the employer and the union agree by contract to provide non-pension benefits to a pensioner for the term of the contract, the failure of the trustees to provide such benefits is arbitrary and contrary to the bargained agreement.

(51) The construction of the contract urged by the Trustees would have the effect of defeating the expressed intention of the parties to provide lifetime benefits to these pensioners, and render the promise of lifetime benefits illusory. The position of the Trustees was held to be arbitrary and capricious by several courts that have addressed the issue. *District 29, UMWA v. Royal Coal Company*, 8 E.B.C. 1556, 1567 (S.D.W.Va.1987); *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F.Supp. 200 (N.D.W.Va.1987); *Grubbs v. UMWA 1974 Benefit Plan and Trust, supra*, slip op. at 11.

(52) As an alternate finding, we hold that the obligation of the Trustees to provide benefits was litigated and

decided in *District 29, UMWA v. Royal Coal Company*, 8 E.B.C. 1556 (S.D.W.Va.1987), *aff'd District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir.1987), *cert. denied* —— U.S. ——, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988); *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F.Supp. 200 (N.D.W.Va. 1987), and *Crockett v. Vecellio & Grogan, Inc.*, No. 85-1448 (S.D.W.Va. Feb. 4, 1987). The argument of the 1974 Benefit Plan that the issue presented in this case is distinct from the issue litigated and decided in *Royal* is without merit. Although the eight employers involved in this litigation present a variety of specific factual situations, most are apparently financially able, either themselves or through solvent parent corporations, to provide benefits to their pensioners, but they are not legally obligated because they are no longer signatories to a collective bargaining agreement which requires them to do so.

(53) The UMWA 1974 Benefit Plan and Trust was a party in *Royal*, *Schifano*, and *Crockett*. *Royal* was decided after a trial on the merits; *Schifano* and *Crockett* were decided on cross-motions for summary judgment. The decision of the district court in *Royal* was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the decision of the district court on August 13, 1987. The Plan's petition for certiorari was denied by the Supreme Court on March 7, 1988. All three judgments are final.

(54) The UMWA 1974 Benefit Plan and Trust had a full and fair opportunity to litigate the issue in the prior actions. It elected to submit *Schifano* and *Crockett* on motions for summary judgment. In *Royal*, following the remand by the Court of Appeals in *Royal I*, the district court granted a preliminary injunction against the 1974 Benefit Plan on August 13, 1985. The trial on the merits was held on July 9, 1986, eleven months later. The 1974 Benefit Plan had a full opportunity to conduct discovery prior to the trial. Following the trial, the district court

left the record open for an additional two months to permit the parties to supplement the record with additional evidence. The *Royal* court had the benefit of testimony from a number of witness, including William Miller of United States Steel Corporation, a main table negotiator for the BCOA in the 1978, 1981, and 1984 negotiations; Roger Haynes of Consolidation Coal Company, the principal BCOA spokesman on benefits issues in the 1978, 1981, and 1984 negotiations; Sam Church, former UMWA vice-president and president and a principal UMWA negotiator in 1978 and 1981; William Hartman of Peabody Coal Company, a BCOA main table negotiator in 1978, and Michael Buckner, a UMWA staff member who was present at the main table and benefits subcommittee negotiations in 1984. The parties also agreed to include by stipulation much of the record developed in the case of *District 17, UMWA v. Allied Corporation*, including depositions of the three trustees of the UMWA Health and Retirement Funds during the terms of the 1978 and 1981 agreements, among them Harrison Combs, General Counsel of the UMWA and a principal UMWA negotiator in 1978 and 1981, and the depositions of Donald Pierce and Roger Haynes, principal benefits specialists for the UMWA and BCOA, respectively, in the 1978 and 1981 negotiations. The court also considered extensive documentary evidence submitted by the parties. The UMWA 1974 Benefit Plan and Trust never contended on appeal in *Royal* that it was deprived of any procedural opportunity to develop and litigate the case adequately. It is clear that the *Royal* case was regarded by all parties as a test case on this issue, and that the 1974 Benefit Plan and Trust had a substantial incentive to vigorously litigate the issue.

(55) The application of the doctrine of non-mutual issue preclusion is appropriate here. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28

L.Ed.2d 788 (1971); *Gregory v. Chehi*, 843 F.2d 111 (3rd Cir. 1988). There is no reason to decline to apply the rule. The individual pensioners in this litigation could not have joined as parties in *Royal* because they were still receiving benefits from their employers at the time. Also, there is no reason to deny issue preclusion because there was no difference in the standard of review of the decisions of trustees between the Third and the Fourth Circuits at the time *Royal* was decided. *Richards v. UMWA Health and Retirement Funds*, 851 F.2d 122 (4th Cir.1988); *LeFebre v. Westinghouse Electric Corporation*, 747 F.2d 197 (4th Cir.1984); *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325 (3d Cir.1984). The 1974 Benefit Plan has been held to be precluded from relitigating the precise issue presented in this case. *Grubbs v. United Mine Workers of American 1974 Benefit Plan and Trust*, No. 87-2207 (W.D.Ark. Feb. 17, 1989); *In re Chateaugay*, No. 86 B 1120, AP No. 88-5502 (Bankr.S.D.N.Y., bench opinions Aug. 1 & 4, 1988); *In re Kaiser Steel Corporation*, No. 87 B 1552 E, —— B.R. —— (Bankr.D.Colo. Feb. 20, 1989.

(56) According to plaintiffs, the legal issue presented in this case is "whether the UMWA 1974 Benefit Plan and Trust is obligated to provide health benefits to individual pensioners of the eight employers involved in this matter, where those employers are no longer legally obligated to do so." Proposed Findings of Fact and Conclusions of Law of Defendants at ¶ 40. Plaintiffs argue that the UMWA 1974 Benefit Plan and Trust litigated the same issue in *District 29, United Mine Workers of America v. United Mine Workers of America 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir.1987), *cert. denied* —— U.S. ——, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988). Hence, the Plan should be precluded from relitigating the same issue in this case. We agree.

(57) "The present case . . . involves use of collateral estoppel—a plaintiff is seeking to estop a defendant from

relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1978). As the Supreme Court has stated, we have broad discretion to determine when offensive collateral estoppel or issue preclusion should be applied. *Id.*

(58) Collateral estoppel bars a party from relitigating issues decided in a prior proceeding where (a) the issue decided in the prior litigation is identical to the issue presented in the action in question, (b) the prior litigation resulted in a final judgment on the merits, (c) the party against whom the estoppel is asserted was a party to the prior action, and (d) the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Orchard v. Covelli*, 652 F.Supp. 1173, 1175 (W.D.Pa.) (citing *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir.1974)), *aff'd without opinion*, 829 F.2d 32 (3d Cir.1987). Application of collateral estoppel will be declined if (a) the party to be estopped had little incentive to vigorously litigate the first action, (b) the first judgment is inconsistent with other judgments on the issue to be estopped or (c) the second action affords procedural opportunities unavailable in the first action. *Glictronix Corp. v. American Telephone and Telegraph Company*, 603 F.Supp. 552, 565 (D.N.J.1984).

(59) In *Royal Coal II*, the Court of Appeals for the Fourth Circuit addressed the issue "whether the 1974 Benefit Plan must provide health benefits where the successor corporation of the former employer is financially able to provide benefits, but is not legally obligated to do so because it is not a signatory to the wage agreement." 826 F.2d at 282. The court concluded that the 1974 Benefit Plan and Trust must assume the burden of providing lifetime benefits to "orphaned" pensioners because "[t]o construe the contract to create no liability on the part of the 1974 Benefit Plan would have the effect of defeating

the expressed intention [of the parties.]" *Id.* at 283. To construe the contract to impose liability on the 1974 Benefit Plan and Trust, according to the court, "can only further the purposes for which the trust fund was created." *Id.*

(60) The 1974 Benefit Plan and Trust argues that the issue presented in the case at bar is different from the issue litigated in *Royal Coal.* We disagree. As defendants note, although the employers involved in this litigation present a variety of factual situations, the employers are "apparently financially able, either themselves or through solvent parent corporations, to provide benefits to their pensioners." Proposed Findings of Fact and Conclusions of Law of Defendants at ¶ 40. However, as in *Royal Coal,* the employers are not legally obligated to provide benefits. Thus, we hold that the issue raised in the instant case is identical to the issue raised in *Royal Coal.*

(61) The 1974 Benefit Plan and Trust does not dispute that a final judgment was rendered in *Royal Coal.* However, the Plan asserts that collateral estoppel should not be applied because "the Union could have easily joined in the *Royal* . . . litigation." Proposed Conclusions of Law Submitted by the 1974 Benefit Plan and Trust at ¶ 12. The Plan cites the general rule set forth in *Parklane Hosiery* that "in cases where a plaintiff could easily have joined in the earlier action . . . the use of offensive collateral estoppel should not be allowed." *Parklane Hosiery,* 439 U.S. at 331, 99 S.Ct. at 651.

(62) We hold that the Union was in privity with the plaintiff in *Royal Coal,* and thus, the issue whether the Union could have joined in the action is not dispositive. The interests of the Union and the plaintiffs in *Royal Coal* were substantially similar, if not identical—that is, to protect the health benefits of "orphaned" retirees. Further, as the Plan concedes, the Union provided the plaintiffs in *Royal Coal* with an attorney who contributed to the litigation strategy of the case, entered an appearance

and participated in the proceedings. Proposed Conclusions of Law Submitted by the 1984 Benefit Plan and Trust at ¶ 12. The Plan also observes that the Union bore the costs of the litigation. *Id.* Finally, we note that with respect to the individual pensioners, they could not have joined as parties in *Royal Coal* because they were still receiving benefits from their employers at that time.

(63) We hold that the 1974 Benefit Plan and Trust had a full and fair opportunity to litigate the issue presented in this case during the *Royal Coal* litigation. Following a remand by the Court of Appeals, the district court granted a preliminary injunction against the Plan on August 13, 1985. The trial on the merits was held on July 9, 1986, eleven months later. Following the trial, the court left the record open for two months for the parties to submit additional evidence. The matter was again appealed, and the decision of the district court with respect to the issue of the Plan's liability was affirmed.

(64) The evidence preponderates that the 1974 Benefit Plan and Trust was given a full and fair opportunity—procedurally, substantively, and evidentially—to defend its position in *Royal Coal* and that the Plan vigorously presented such a defense. *See Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 845 (3d Cir.1974). We note that the Plan does not contend that it was afforded procedural opportunities which were unavailable in the first action or that the controlling circumstances have changed to that application of collateral estoppel would be inappropriate.

(65) The 1974 Benefit Trust and Plan argues that the judgment in *Royal Coal* is inconsistent with the judgment in *Scarbo v. Slab Fork Coal Company*, No. 5:83-5309 (S.D.W.Va. June 10, 1987), and thus application of issue preclusion is unfair. In our judgment, the decisions are not inconsistent. In *Scarbo*, the employer was a signatory to the wage agreement. The company was

forced into bankruptcy but continued to operate its carbon black plant, which employed nine persons covered under the wage agreement. The court concluded that by continuing to employ classified workers at its plant, the employer failed to meet the second element of the "no longer in business" test; hence, the employer was still in business under the agreement. Slip op. at 3. Although the courts in *Royal Coal* and *Scarbo* were required to interpret the "no longer in business" clause in the agreements, the similarity between the cases ends there. One of the most significant distinguishing facts in the cases is that in *Royal Coal*, the successor corporations were not signatories under the agreement. Further, the district court in *Scarbo* was required to examine only the language of the agreement; the court in *Royal Coal* was required to examine the intent of the parties.

(66) Finally, the 1974 Benefit Plan and Trust argues that collateral estoppel is inappropriate in this case in light of the early stage of development of employee benefits law and the important issues involved. We recognize that significant issues and interests are at stake. However, with respect to the Plan's claim concerning the development of employee benefits law, we note that the decision of the Court of Appeals in *Royal Coal* rested on the interpretation of the wage agreements, not on the construction and application of employee benefits law.

(67) In sum, we hold that all of the elements have been satisfied to invoke offensive collateral estoppel against the 1974 Benefit Plan and Trust and that the Plan is, therefore, bound by the decision in *Royal Coal*.

(68) With respect to the BCOA, we hold that the BCOA is not bound by the decision in *Royal II*. The parties do not dispute that the BCOA was not a party in the *Royal* litigation. However, the Union argues that the BCOA had the opportunity and motivation to intervene and participate in the *Royal* litigation and, as a result, the BCOA should be bound by the decision.

(69) The Supreme Court recently rejected a similar argument in *Martin v. Wilks*, —— U.S. ——, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). In *Martin*, the Court addressed the issue whether a non-party that was aware of an earlier action, but failed to intervene, should be precluded from litigating the issue in a subsequent action. The Court stated in pertinent part:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the 'impermissible collateral attack' doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24.

Id. at ——, 109 S.Ct. at 2183-84.

(70) The Union argues that the decision in *Martin* is inapplicable to the instant case because the BCOA's claims are not independent from those asserted by the 1974 Benefit Plan. In other words, according to the Union, the BCOA is seeking to litigate the obligations of the Plan as a surrogate. Whether the claims are independent is not dispositive. The BCOA was not a party in the *Royal Coal* litigation, and in light of the decision in *Martin*, the BCOA cannot be bound by the judgment in *Royal II*.

(71) We find that the Union and the individual plaintiff's have established by a preponderance of the evidence

success on the merits in their claims against the BCOA and the 1974 Benefit Plan. We also find that plaintiffs have sustained their burden of proving irreparable harm, that defendants will not suffer substantial harm from the grant of an injunction, and that the public interest favors injunctive relief.

(72) The record is replete with evidence concerning the hardship that the individual plaintiffs are experiencing absent the health care and other benefits to which they are entitled under the Plan documents. Medical treatment has been postponed, hospitalizations delayed and life insurance avoided. Many of the pensioners have attempted to purchase alternate coverage with limited success due to sparse resources and advanced age.

(73) The BCOA and the 1974 Benefit Plan will not suffer substantial harm from the grant of an injunction. The signatory employers to the 1988 NBCWA agreed to increase contributions, if necessary, to insure the solvency of the Benefit Plan and, as rehearsed, the Trustees are empowered to enforce the guarantee clause of Article XX(h).

(74) The public interest also favors the grant of an injunction. Pensioners to whom non-pension benefits are payable are entitled to payment forthwith, without attempting to purchase additional insurance coverage or paying medical bills with limited resources, and then suing the Plan for reimbursement. In short, the public policy requires that the retirees should receive the bargained for non-pension benefits for the remainder of the contract and without further delay.

(75) The court will certify a class pursuant to Fed. R.Civ.P. 23(b)(2). The class consists of in excess of 2100 pensioners, retired or disabled miners under the UMWA 1974 Pension Plan who were employed by former employers signatory to the National Bituminous Coal Wage Agreements of 1978, 1981, 1984 and 1988. Also included in the class are the spouses and dependents of such pen-

sioners. However, those pensioners whose last signatory employers' operations are or were located within the jurisdiction of UMWA Districts 17, 28, 29 or 31 are excluded from the class because those districts are within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. We find that the requirements of numerosity, commonality, typicality and adequacy of representation have been met.

(76) Federal Rule 23(b)(2) provides that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The 1974 Benefit Plan and the BCOA assert that Rule 23(b)(2) is satisfied in its argument for certifying a defendant class of pensioners. We need not resolve the issue whether a defendant class may be maintained pursuant to Rule 23(b)(2) because the arguments made by the Plan and the BCOA for a defendant class apply to plaintiffs' class of pensioners. The only objection that the UMWA and pensioners expressed in their papers in opposition to maintenance of a class action is that Rule 23(b)(2) does not contemplate the certification of a defendant class. The Union expressed no position with respect to a plaintiffs' class, although Civil Action 88-546 abounds with class overtones. We hold that Rule 23(b)(2) of the Federal Rules of Civil Procedure has been satisfied and that a class of plaintiffs will be certified.

(77) We also find that the interests of judicial economy mandate that this action should be maintained as a class action under Fed.R.Civ.P. 23(b)(3). In Civil Action 88-0545, the Trustees of the 1974 Benefit Plan and the BCOA seek to certify a defendant class of UMWA pensioners. In Civil Action Nos. 86-2638, 88-0546 and 88-1842, the UMWA pensioners are plaintiffs and the United Mine Workers of America 1974 Benefit Plan and Trust is the defendant. The court finds there are ques-

tions of law and fact common to the parties and these questions control any questions involving individual claimants. This class, with the exception of Districts 17, 28, 19 and 31 of the UMWA, meets the four prong test of Rule 23(b)(3).

(78) The class of plaintiffs is defined as pensioners, their spouses and dependents under the UMWA 1974 Pension Plan (a) who are or were eligible for health benefits under employee welfare plans maintained by employers signatory to the 1978, 1981 and 1984 NBCWA; (b) whose last signatory employer ceased providing health benefits to pensioners who last worked for the employer or will cease providing health benefits to such pensioners before a final judgment is entered in this action; (c) whose last signatory employer satisfies the definition of "no longer in business" set forth in the 1988 NBCWA and the Plan document effective June 7, 1981 and as subsequently amended effective October 1, 1984 and February 1, 1988; and (d) whose last signatory employer did not or does not operate principally within the jurisdiction of UMWA Districts 17, 28, 29 or 31, or the United States Court of Appeals for the Fourth Circuit, or any pensioner who was last employed by LTV Steel Corporation, its subsidiaries or affiliates. Nothing herein shall be construed to include pensioners of companies that are signatory to agreements with the UMWA, but that (pursuant to those agreements) do not provide health benefits to certain pensioners, as for example, the agreement negotiated by the UMWA with A.T. Massey Co.

(79) Counsel for the United Mine Workers of America International Union, Districts 2, 4, 5 and 6, and the individual plaintiffs, shall submit appropriate orders to the court, within 10 days, including an order defining the class, an injunctive decree with security as required by Rule 65(c), and an order for the entry of judgment in accordance with Rule 52(b).

APPENDIX C

Order of the District Court
(August 29, 1989)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 86-2638

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, by THOMAS RABBIT, TRUSTEE ad litem; DISTRICT 4, UNITED MINE WORKERS OF AMERICA,
Plaintiffs,

vs.

MAX NOBEL, *et al.*,
Defendants.

Civil Action 88-0545

BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

Civil Action 88-0546

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,

Defendants.

Civil Action 88-1842

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendant.

ORDER OF COURT

AND NOW, this 29th day of August 1989, in accordance with the findings of fact and conclusions of law of record,

IT IS ORDERED that judgment be and hereby is entered on behalf of plaintiffs, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, an unincorporated association by Thomas Rabbit, Trustee Ad Litem; DISTRICT 4, UNITED MINE WORKERS OF AMERICA, an incorporated association, by James Kelly, Trustee Ad Litem; LOCAL UNION 1313, UNITED MINE WORKERS OF AMERICA, an incorporated association, by Joe Dirda, Trustee Ad Litem; As Representa-

tives of their Members who are pensioners of the MENALLEN COKE COMPANY, JOSEPH DIRDA, STEVEN BOGOL, JOHN KRULOCK, GEORGE SALIPEK, LYNUS TUTTLE, CALVERT THOMPSON, HARRY BLAKE, JOHN HUDOCK, EDWARD POLLICK, and EARL WINGROVE, and defendants MAX NOBEL, an individual, and MENALLEN COKE COMPANY, a partnership, and against the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, at Civil action No. 86-2638.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of defendants, INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association; and VENANZIO VITALI, JOHN C. ROLAND, ALEXANDER J. PLESS, WALLACE M. BERRYHILL, GEORGE L. FARRIS, ROBERT B. MILES, SR., HOWARD R. MARTIN, DANIEL KERI, DONALD E. SHAFFER, CHARLES C. GEYER, JOHN K. STODDARD, HENRY F. OKLER, CARL E. KLINK, HAROLD E. MILLER, HERBERT C. HOOVER, MARTIN WARREN, HOLLY MILLER, GEORGE C. VAHALIK, individually and as representatives of a class of similarly situated individuals, and against plaintiffs, BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, JOSEPH P. CONNORS, SR., DONALD E. PIERCE, JR., WILLIAM MILLER, WILLIAM B. JORDAN, and PAUL R. DEAN, as Trustees, and intervenor BITUMINOUS COAL OPERATORS, INC., at Civil Action No. 88-545.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of plaintiffs, INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT 2 and DISTRICT 5, UNITED MINE WORKERS OF AMERICA, and DONALD ABRAMS, MARTIN L. ABRAMS, PETER P. ABROMOVICH, et al., and against defendant, UNITED MINE

WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, at Civil Action No. 88-546.

IT IS FURTHER ORDERED that judgment be and hereby is entered on behalf of plaintiffs, INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA; DISTRICT SIX, UNITED MINE WORKERS OF AMERICA; GEORGE ANDERSON, Retiree; JULIA McCONNELL, Surviving Spouse; and JIMMY EYNON, Disabled Retiree; and JOHN AND MARY DOE, and against defendant, UNITED MINE WORKERS OF AMERICA, 1974 BENEFIT PLAN AND TRUST, at Civil Action No. 88-1842.

IT IS FURTHER ORDERED that counsel for the prevailing parties shall file applications for counsel fees and costs, with supporting affidavits, in the form directed by the court at the conference of August 23, 1989, within 30 days.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

cc: Counsel of record.

APPENDIX D

Amended Order of District Court Granting Injunctive Relief (October 19, 1989)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 86-2638

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, by THOMAS RABBIT, TRUSTEE ad litem; DISTRICT 4, UNITED MINE WORKERS OF AMERICA,
Plaintiffs,

vs.

MAX NOBEL, *et al.*,
Defendants.

Civil Action 88-0545

BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

Civil Action 88-0546

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,

Defendants.

Civil Action 88-1842

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendant.

AMENDED ORDER OF COURT GRANTING INJUNCTIVE RELIEF

AND NOW, this 19th day of October, 1989, in accordance with the Findings of Fact and Conclusions of Law dated August 3, 1989, and the subsequent submissions of counsel, the court finds that plaintiffs, United Mine Workers of America, various districts, and the individual pensioners have established by a preponderance of the evidence success on the merits of their various claims and defenses, and further that plaintiffs have established that the individual plaintiffs will suffer irreparable harm if injunctive relief is denied, and further that defendants will not suffer substantial harm from the grant of an injunction, and further that the public interest requires injunctive relief under the circumstances,

IT IS THEREFORE ORDERED that:

1. The defendant, United Mine Workers of America 1974 Benefit Plan and Trust, be and hereby is permanently enjoined and restrained from refusing or failing to provide the health care coverage, as such coverage is specified in the 1981, 1984 and 1988 National Bituminous Coal Wage Agreements, and in the 1974 Benefit Plan established and maintained pursuant to said agreements, to the individual plaintiffs and to members of the class certified by the court.

2. The defendant, United Mine Workers of America 1974 Benefit Plan and Trust, shall reimburse the pensioners and eligible dependents as defined in the amended order granting class certification for all health care expenses which are provided or covered under the provisions of the 1974 Benefit Plan and which were incurred by said pensioners or their eligible dependents, on or after the date an employer ceased to be signatory to a collective bargaining agreement with the UMWA requiring the employer to provide benefits, except to the extent that such benefits were actually provided by the employer subsequent to such date. The reimbursement shall include reimbursement for premiums paid by the individual plaintiffs to obtain alternative health insurance coverage during the period for which the 1974 Benefit Plan was obligated to provide benefits.

3. Pre-judgment interest shall be awarded at the rate of 10 per cent from the date that each class member incurred reimbursable expenses because (a) the 1974 Benefit Fund and Trust has withheld a liquidated sum for a time certain and the pensioners, or dependents, are entitled to be made whole; (b) the Fund has invested the sums to which the claimants are entitled; (c) the pensioners or their dependents have lost the use of the money that they were required to expend to obtain health care or insurance coverage; (d) plaintiffs have pursued their

claims expeditiously; (e) federal law, rather than state law, provides the appropriate rate of interest. *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Civ. 1986); and (f) the rate of 10 per cent is fair and commensurate with market rates during the relevant period. 28 U.S.C. 1961.

4. The UMWA 1974 Benefit Plan and Trust shall forthwith review its records to identify all members of the class covered by this order and shall promptly notify the class members of their eligibility for benefits, and shall provide identification cards identifying the class members as participants in the UMWA 1974 Benefit Plan and Trust, for use in obtaining necessary and appropriate medical services. The UMWA 1974 Benefit Plan and Trust shall further establish procedures for processing claims for reimbursement pursuant to paragraph 2 of this order, and shall provide members of the class with any necessary forms and instructions for obtaining reimbursement of their past expenses, within 60 days.

IT IS FURTHER ORDERED that the International Union, United Mine Workers of America, shall file a bond or other security approved by the court, pursuant to Rule 65(c) and the teachings of *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, No. 89-5337 (3d Cir. August 17, 1989), in the sum of $500,000 to indemnify the defendant, 1974 Benefit Plan, in the event that the injunction is determined on appeal to be erroneous, and to inform the UMWA "of the price [it] can expect to pay if the injunction was wrongfully issued." *Id.* at 18.

IT IS FURTHER ORDERED that the bond or other security shall be deposited with the Clerk of Court within 30 days because that is the period within which the claims for payment or reimbursement will be processed by the

1974 Benefit Plan, and within which appellate review can be reasonably anticipated.

The Clerk shall be and hereby is directed to mail certified copies of this order to counsel and parties of record.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

cc: Counsel of record.

APPENDIX E

Amended Order of District Court Granting Class Certification (October 19, 1989)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 86-2638

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, by THOMAS RABBIT, TRUSTEE ad litem; DISTRICT 4, UNITED MINE WORKERS OF AMERICA,
Plaintiffs,

vs.

MAX NOBEL, *et al.*,
Defendants.

Civil Action 88-0545

BOARD OF TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,
Plaintiffs,

vs.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,
Defendants.

Civil Action 88-0546

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST, *et al.*,

Defendants.

Civil Action 88-1842

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *et al.*,

Plaintiffs,

vs.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendant.

AMENDED ORDER OF COURT GRANTING CLASS CERTIFICATION

AND NOW, this 19th day of October, 1989, it appearing to the court that the UMWA 1974 Benefit Plan previously filed a Motion for Class Action Determination in this action, in which the BCOA concurred and to which the United Mine Workers and the individual plaintiffs do not object, and further in accordance with the Findings if Fact and Conclusions of Law filed on August 3, 1989, the court finds as follows:

1. The class consists of more than 2100 individuals, and is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the class and that the rights of the class members and the obligation of the UMWA 1974 Benefit Plan to the class are dependent upon the construction of collective bargaining agreements and trust documents common to all members of the class.

3. The claims of the named individual plaintiffs are typical of the claims of the class.

4. The representative parties, which consist of several hundred individual plaintiffs, the International Union and four districts of the United Mine Workers, will fairly and adequately protect the interests of the class.

5. Class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2) because the UMWA 1974 Benefit Plan and Trust, the party opposing the class, has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief and corresponding declaratory relief appropriate with respect to the class as a whole.

6. Class certification is also appropriate pursuant to Federal Rule of Civil Procedure 23(b)(3), in that these four consolidated cases involve common questions of law and fact, which predominate over any questions affecting only individual members of the class, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, and that, with the exception of the pensioners who have been excluded from the class, the class meets the four prong test of Rule 23(b)(3).

IT IS THEREFORE ORDERED that the motion for class certification be and hereby is granted and that this action shall be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and (3).

The class of plaintiffs, consisting of in excess of 2100 members, is defined as pensioners, retired or disabled

miners, their spouses and dependents under the UMWA 1974 Pension Plan (a) who are or were eligible or will become eligible for health benefits under employee welfare plans maintained by employers signatory to the 1978, 1981 or 1984 National Bituminous Coal Wage Agreements; (b) whose last signatory employer ceased providing health benefits to pensioners who last worked for the employer or will cease providing health benefits to such pensioners before a final judgment is entered in this action; (c) whose last signatory employer satisfies the definition of "no longer in business" as set forth in the 1988 NBCWA and the Plan document effective June 7, 1981, and as subsequently amended effective October 1, 1984 and February 1, 1988, as construed and interpreted by the court in its Findings of Fact and Conclusions of Law, including all pensioners and their dependents whose last signatory employer is no longer signatory to a collective bargaining agreement requiring said employer to provide such benefits.

Excluded from the class are pensioners whose last signatory employer operates principally within the jurisdiction of UMWA Districts 17, 28, 29, 31, or within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, or pensioners whose last signatory employer was LTV Steel Corporation, its subsidiaries or affiliates, or pensioners whose last signatory employer is providing health benefits to its pensioners, whether by agreement with UMWA or otherwise, or pensioners against whose last signatory employer the UMWA is engaged in an active strike including but not limited to the Pittston Coal Company, its subsidiaries, or affiliates, or pensioners who worked for companies which have entered into collective bargaining agreements with the UMWA that do not require the companies to continue to provide health benefits to their pensioners.

IT IS FURTHER ORDERED that appropriate notice of this determination shall be given to the class by the

UMWA, International Union, by publication in the UMWA Journal and by mailing notice to each member of the class whose name and address can be determined from the records of the UMWA 1974 Benefit Plan, or otherwise ascertained. The UMWA 1974 Benefit Plan shall forthwith provide to plaintiffs' counsel the names and addresses of all class members who can be identified from the records of the UMWA Health and Retirement Funds. The costs of providing notice and publication shall be paid by the 1974 UMWA Benefit Fund.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

cc: Counsel of record.

APPENDIX F

Order Denying Petition For Rehearing

(June 18, 1990)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3734

UNITED MINE WORKERS OF AMERICA
INTERNATIONAL UNION, an unincorporated association
by THOMAS RABBIT, Trustee ad Litem

DISTRICT 4, UNITED MINE WORKERS OF AMERICA
an incorporated association by James Kelly,
Trustee Ad Litem

LOCAL UNION 1313, UNITED MINE WORKERS OF AMERICA,
an incorporated association by Joe Dirda,
Trustee Ad Litem

As Representatives of their Members who are
pensioners of the MENALLEN COKE COMPANY

v.

MAX NOBEL, individual and
MENALLEN COKE COMPANY, a partnership and the
UNITED MINE WORKERS OF AMERICA
1974 BENEFIT PLAN AND TRUST
(D.C. Civil No. 86-2638)

BOARD OF TRUSTEES OF THE
UNITED MINE WORKERS OF AMERICA 1974
BENEFIT PLAN AND TRUST, JOSEPH P. CONNORS, SR.,
DONALD E. PIERCE, JR., WILLIAM MILLER,
WILLIAM D. JORDAN, and PAUL R. DEAN, as Trustees
THOMAS SAGGAU

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association; and VENANZIO VITALI, JOHN C. ROLAND, ALEXANDER J. PLESS, WALLACE M. BERRYHILL, GEORGE L. FARRIS, ROBERT B. MILES, SR., HOWARD R. MARTIN, DANIEL KERI, DONALD E. SHAFFER, CHARLES C. GEYER, JOHN K. STODDARD, HENRY F. OKLER, CARL E. KLINK, HAROLD E. MILLER, HERBERT C. HOOVER, MARTIN WARREN, HOLLY MILLER, GEORGE C. VAHALIK, individually and as representatives of a class of similarly situated individuals
(D.C. Civil No. 88-545)

J. KNAPIK, ELMER J. KNOPSNYDER, JOSEPH J. KOCHINCKY, CLAIR F. KOONTZ, STANLEY KOPCZYH, NICK KORINCHANK, JOHN KOSIS, MARGARET KOST, CLARE R. KOWALSKI, CASIMIR J. KOWARDY, JOHN L. KRISE, JOHN KRISKO, JOHN KRIVACSY, MICHAEL J. KRUPA, PETER J. KUDLAWIEC, PETER KUTSICK, JOSEPH KUZEK, JOHN KWAPIK, EDWIN P. LANDIS, JAMES W. LANE, JOHN J. LASH, IRVIN PAUER, HARRISON D. LEARN, WILLIAM LEE, EDWIN P. LEGO, MORRIS LEGROS, CLYDE KEPLEY, RALPH D. LEWIS, FRANCIS A. LIGDA, ROY LINDENBERG, GEORGE E. LOCKARD, WILLIAM E. LORENSO, FRED A. LUDWIG, PAUL J. MALICKY, MERLE W. MALLOY, AUGUST F. MANIFEST, JULIUS MANIFEST, DWAYNE O. MANSBARGER, JOSEPH J. MARCHITELLI, JOSEPH MARDULA, HARRY C. MARIS-

KAWISH, ANGELO J. MARRA, HOWARD R. MARTIN, JOSEPH G. MARUSA, TONY MASTALER, STANLEY A. MATTIS, METRO MAZURAK, ROLE MCMASTERS, GEORGE A. MCMULLEN, JOSEPH C. MCMULLEN, MIKE A. MERCURIOM, JOSEPH J. MESOROS, STEVE MESOROS, VINCENT G. MIHOERCK, BARBARA A. MILLER, BRUCE MILLER, DONALD J. MILLER, HAROLD E. MILLER, PAUL MILLER, RAY A. MILLER, JOHN MINO, GEORGE F. MITCHELL, JOHN E. MONTGOMERY, ENRICO MOROM, HARRY J. MORSE, JOHN R. MOYER, EUGENE H. MURPHY, LEWIS MUSSO, CLYDE A. MYERS, CLAYTON B. NAGLE, FRANK M. NATARIAN, STANLEY NIEMIEC, HELEN OBLINSKY, HENRY F. OKLER, JEANNETTE ONUFRO, WILLIAM J. OPDENHOFF, JOHN OROSZ, JOSEPH PACSAI, HARRY A. PAINTER, ARCHIE J. PANARO, RICHARD N. PASSMORE, HOMER D. PAUL, CLAIR L. PEACOCK, COURTLAND R. PEACOCK, RALPH PERSUHN, GEORGE PETRO, JOHN PETRO, JOHN PETRUSKA, HELEN PETYAK, DONNA J. PISARICK, STEVE PLASO, ALEX J. PLESS, JOHN T. PLESS, MERLE R. PLETCHER, FREDERICK F. PODORNEY, DOROTHY A. PONTANI, JOSEPH W. POTONIC, WILLIAM PRANDI, JOSEPH S. PRESTO, JAMES R. PROCE, STANLEY PRZYROCKI, MIKE PUZAK, LLOYD L. QUEER, JULIAN J. QUEUY, EDWARD R. RAJNISH, JOHN J. RANISH, GEORGE RAYNISH, BUD J. REARICK, IVAN REARICK, STEPHEN REVAK, RALPH J. RHOADES, JAMES W. RICHEY, RICHARD J. REIGER, JAMES E. RINGLER, FRANK J. ROCK, JOHN C. ROLAND, ALEX RUDDOCK, ROSE L. RUMMEL, LEONARD RUTKA, TOM SACKIE, ALEXANDER SAGE, DOROTHY J. SAMOLE, PAUL B. SCHIRF, ROBERT N. SCHROCK, ADAM SCLESKY, STANLEY J. SCRAFIN, WILLIAM P. SEMELSBERGER, STANLEY SEMUSKIE, LOUIS SHABICK, DONALD E. SHAFFER, JOSEPH R. SHEPOSH, WILMER A. SHERRY, MARTIN T. SHOLTIS, HARRY L. SIMMERS, JOHN SIMON, DONALD L. SINCLAIR, DOROTHY L. SINCLAIR, STEVE SINGEL, STEVE SIROCHMAN, EDWARD P. SITOSKY, LOUIS SLOVIKOSKY, EDWARD M. SMITH, EMERY R.

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v.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST
(D.C. Civil No. 88-546)

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICT SIX, UNITED MINE WORKERS OF AMERICA, GEORGE ANDERSON, Retiree JULIA MCCONNELL, Surviving Spouse and JIMMY EYNON, Disabled Retiree and JOHN and MARY DOE

v.

UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST (D.C. Civil No. 88-1842) BITUMINOUS COAL OPERATORS' ASSOCIATION, INC. (Intervenor in D.C.)

Appellant

SUR PETITION FOR REHEARING

BEFORE: HIGGINBOTHAM, *Chief Judge*; SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and an majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

/s/ Robert E. Cowen
Circuit Judge

Dated: Jun. 18, 1990

APPENDIX G

RELEVANT STATUTORY PROVISIONS

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

SECTION 404(a)(1) OF ERISA, 29 U.S.C. § 1104(a)(1), PROVIDES:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter III of this chapter.

* * * *

SECTION 502(a) OF ERISA, 29 U.S.C. § 1132(a), PROVIDES:

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

(2)

No. 90-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA,
INTERNATIONAL UNION,
AN UNINCORPORATED ASSOCIATION,
BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989)	13, 15, 17
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Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212 (1979)	9
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De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989)	14, 15
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District 29, UMWA v. Royal Coal Company, 8 EBC 1556 (S.D.W.Va. 1987)	2, 9, 21, 22
District 29, UMWA et al. v. Royal Coal Company (Royal Coal I), 768 F.2d 588 (4th Cir. 1985)	7
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Dzinglski v. Weirton Steel Corp., 875 F.2d 1075 (4th Cir. 1989), cert. den., 110 S.Ct. 281 (1989) 13, 17
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Galgay v. Gil-Pre Corporation, 864 F.2d 1018 (3rd Cir. 1988) 9
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International Union, United Auto Workers v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), cert. den., 465 U.S. 1007 (1984) 6, 22
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Richards v. UMWA Health and Retirement Fund, 895 F.2d 133 (4th Cir. 1990) 17
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United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators Association, 890 F.2d 177 (D.C. Cir. 1990) 27

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United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988)	22
United Steelworkers v. Textron, Inc., 836 F.2d 6 (1st Cir. 1987)	6, 22
Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-464

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
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UNITED MINE WORKERS OF AMERICA,
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AN UNINCORPORATED ASSOCIATION,
BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves the interpretation of provisions of the National Bituminous Coal Wage Agreement ("NBCWA"), a national collective bargaining agreement periodically negotiated between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association ("BCOA") for 40 years, and the benefit plans established by those agreements for the purpose of providing health care benefits to retired and disabled coal miners and their dependents.

As the district court noted, this case presented "a straightforward factual dispute" regarding the intent of the parties to those collective bargaining agreements. App. 10a. The question presented was whether the

UMWA 1974 Benefit Plan was obligated to provide benefits to pensioners whose last employers were no longer signatory to a collective bargaining agreement with the UMWA, and therefore no longer legally obligated to provide benefits under the terms of such an agreement. The district court concluded from the evidence, including the language of the documents, the bargaining history of the parties, and the testimony of the negotiators for both sides, that the 1974 Benefit Plan was required to provide benefits under those circumstances.

The issue presented in this case was precisely the question previously decided in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987), cert. den. 485 U.S. 935 (1988), affirming *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556 (S.D.W.Va. 1987), which held that the UMWA 1974 Benefit Plan and Trust was required to provide health benefits to pensioners whose last employers were no longer obligated to provide benefits. A number of other courts have considered the same issue. Without exception, they have reached the same conclusion. *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87), *Grubbs v. UMWA 1974 Benefit Plan*, 723 F. Supp. 123 (W.D.Ark. 1989), *In re Chateaugay*, 111 B.R. 399, 12 EBC 1057, 90 U.S. Dist. Lexis 2484 (S.D.N.Y. 1990), *In re Kaiser Steel Corporation*, No. 87 B 1552 E (Bnkrptcy, D. Colo., bench opinion 2/20/89).

The BCOA, an intervenor in the proceedings before the district court, disagrees with this unanimous judicial construction of the agreements and plan documents. Its argument about the appropriate standard of judicial review of the trustees' refusal to provide benefits is merely an excuse to reargue its interpretation of the facts in this case, an interpretation which differs significantly from the facts found by the district court.

Procedural Background

This Court denied the UMWA 1974 Benefit Plan's petition for certiorari in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust, supra,* on March 7, 1988. Three days later, the trustees of the 1974 Benefit Plan filed a complaint in the Western District of Pennsylvania against the UMWA and several named pensioners as class representatives, seeking a declaratory judgment that the 1974 Benefit Plan was not obligated to provide benefits to pensioners similarly situated to those in *Royal Coal II* outside the jurisdiction of the Fourth Circuit. The BCOA, which participated as *amicus curiae* in *Royal Coal II* before the Fourth Circuit and filed a brief in support of the 1974 Benefit Plan's petition for certiorari, was permitted to intervene in the trustees' declaratory judgment action. That action was eventually consolidated with three other cases filed by the UMWA and various named pensioners in the Western District of Pennsylvania and the Southern District of Ohio, seeking benefits from the 1974 Benefit Plan.

Following a trial on the merits, the district court found that the pensioners were entitled to benefits from the 1974 Benefit Plan, and rejected the arguments of the trustees and the BCOA. The court found that *de novo* review was appropriate pursuant to this Court's holding in *Firestone Tire and Rubber Co. v. Bruch,* 109 S.Ct. 948 (1989), and concluded that the interpretation of the trustees was clearly erroneous. In the alternative, the court also found that the interpretation of the trustees was arbitrary and capricious under the abuse of discretion standard of review.

The district court also concluded that the trustees were precluded from relitigating the issue of their liability in view of the final judgment in *Royal Coal II.*[1]

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[1] The courts in *Grubbs v. UMWA 1974 Benefit Plan, In re Chataeaugay,* and *In re Kaiser Steel Corporation, supra,* also found that the trustees were precluded, although in each case the court also reached and decided the merits of the dispute.

The 1974 Benefit Plan did not appeal the ruling of the district court. The BCOA, as intervenor, appealed to the Third Circuit, which affirmed the decision of the district court without opinion. Notwithstanding the unanimous findings of two circuits and five district courts, BCOA now asks this court to reexamine the facts once again.

Factual Background

The district court summarized the bargaining history regarding these benefits in great detail in its findings. Since 1950, retired UMWA coal miners have received lifetime health benefits with their retirement pensions.[2] From 1950 to 1974, those benefits were provided by a single multiemployer trust, the United Mine Workers Welfare and Retirement Fund of 1950. Until 1974, the trustees had complete authority to set benefit levels and to establish and interpret eligibility requirements.

In the 1974 NBCWA, the trust was split into two benefit trusts and two pension trusts, designated the 1950 Pension and Benefit Plans and the 1974 Pension and Benefit Plans, respectively. The 1974 Benefit Plan provided health benefits to active miners and post-1975 retirees. The 1974 Agreement extended lifetime health benefits to widows,[3] and included a summary of benefits which provided that a retired miner would retain a health card "until death" and a widow "until her death or remarriage." App. 16a-17a.

The 1974 Agreement also resulted in a drastic change in the scope of the trustees' discretionary authority. The parties agreed to specify the benefits to be provided and the eligibility criteria in the agreement and plan docu-

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[2] The petitioner's eligibility for benefits was not affected by whether his last employer ceased operations, went out of business, or failed to become signatory to successor agreements. App. 16a.

[3] See, *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

ments and the trustees no longer had the discretionary authority to establish eligibility standards or to construe the terms of the trust. Finding 47, App. 30a.

In the 1978 Agreement, after the two benefit plans suffered a shortfall in contributions and were forced to cut benefits, the parties agreed to a substantial restructuring of the health care delivery system for active employees and post-1975 retirees. The agreement contained three fundamental elements. First, the UMWA agreed to the establishment of individual employer benefit plans as the primary mechanism for health care delivery, with each employer providing benefits to its active employees and to retirees last employed by such employer. In exchange for that concession, the BCOA agreed to retain the 1974 Benefit Plan as a "safety net" for the purpose of providing benefits to existing and future "orphaned" pensioners, and also agreed to guarantee unconditionally the solvency of the four multiemployer trusts, to ensure that benefits would be paid at the agreed levels. The district court specifically found no evidence of any intent to alter the nature of the benefits provided or to exclude some pensioners from coverage as a result of the change in the delivery system. Findings 42, 44, App. 27a-29a.

Significantly, the BCOA attempted to remove from the 1978 Agreement the language referring to the lifetime duration of retiree health benefits. It proposed language that omitted all reference to lifetime benefits. The UMWA refused to agree to the deletion and language was reinserted in the summary of plan benefits, in several places, providing that a retired miner would retain a health card "for life" and a widow "until her death or remarriage." Finding 21, App. 19a.

The district court found from this history and the language of the agreement a clear intent to provide lifetime benefits to retired miners and their widows, as a vested benefit. Finding 40, App. 27a. This finding is fully in accord not only with the other courts which have con-

strued the NBCWA with respect to these benefits, including *Royal Coal II* and the other cases cited *supra*, but with a larger body of case law which holds that whether retiree benefits are vested lifetime benefits is a question of the intent of the parties, to be determined from the language of the agreements and the bargaining history of the parties. See, *International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. den. 465 U.S. 1007 (1984), *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987).[4] The language of this particular collective bargaining agreement is remarkable primarily in the clarity with which that intent is expressed.[5]

The district court found that although the intent to provide lifetime benefits was clear and unambiguous, the collective bargaining agreements and plan documents were ambiguous with respect to whether the employer, through its individual employer benefit plan, or the 1974 Benefit Plan was obligated to provide benefits to retirees where the employer is no longer signatory to the collective bargaining agreement. Finding 41, App. 27a.

The BCOA suggests in its petition that the district court's decision permits employers still in the coal business to dump their retirees into the plan, to obtain health care financed by their competitors. This suggestion is misleading in several respects.

BCOA does not contend that the last employers of the pensioners affected by this case are responsible for providing their health benefits. Those employers have no

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[4] See, generally, J. Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance*, 9 Ind. Rel. L. J. 183 (1987).

[5] Of the numerous cases finding a right to lifetime retiree health benefits, only *Policy v. Powell Pressed Steel*, 770 F.2d 669 (6th Cir. 1985) contains a comparably unambiguous expression of intent to create a lifetime benefit (pensioners would receive coverage "during the lifetime of the pensioner").

legal obligation to provide benefits to their retirees. The issue of the employer's obligation to provide retiree benefits after the expiration of the collective bargaining agreement has been fully litigated in a number of cases. Without exception, the courts construed the agreements to limit the obligation of the employer to provide benefits to the term of the contract, and to place the obligation to provide benefits thereafter on the 1974 Benefit Plan. *District 17, UMWA et al. v. Allied Corporation*, 735 F.2d 121 (4th Cir. 1984), on reh. *en banc*, 765 F.2d 413 (4th Cir. 1985), cert. den. 473 U.S. 905 (1985), *District 29, UMWA et al. v. Royal Coal Company (Royal Coal I)*, 768 F.2d 588 (4th Cir. 1985), *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D.Ala. 1986), *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87), *District 2, UMWA v. G. M. & W. Coal Company*, 7 EBC 1105 (W.D. Pa. 1986).

The UMWA has proposed contract language which would have prevented the "dumping" BCOA criticizes. In negotiations for the 1984 Agreement, following the first significant decision on this issue, the panel decision in *Allied*, the UMWA proposed language which would have made it clear that the employer's responsibility for retiree health benefits continued beyond the expiration of the contract. The BCOA refused to agree to that language *because it agreed with the portion of the Allied decision limiting the employer's obligation to the term of the agreement.* Finding 32, App. 23a. The BCOA wants it both ways—they wish to limit their own liability to the term of the agreement, but object to the 1974 Benefit Plan being required to assume the obligations of other employers, most of them former BCOA members, when they take advantage of that limitation.

The BCOA's complaint of unfairness in being required to collectively shoulder responsibility for these individuals

is overstated in other respects as well. The 1974 Benefit Plan is funded by contributions from all employers signatory to the NBCWA, not solely employers who are members of the BCOA. Many employers signed "me-too" agreements binding themselves prospectively to the terms of the national agreement, and many others sign the national agreement once it is negotiated between the UMWA and the BCOA. Of the eight employers involved in this case, five are former BCOA members, and all eight were signatory to the 1978 Agreement and paid royalties into the 1974 Benefit Plan during the term of that agreement.[6]

Not only was the BCOA in full agreement with the decisions limiting the obligation of the employer to the term of the agreement, but the trustees themselves adopted those rulings and issued dozens of decisions holding that the obligation of the employer was limited to the term of the collective bargaining agreement to which it was signatory.[7]

The true position of the BCOA is not that the last employers of these pensioners were obligated to provide their benefits, but that they were not entitled to benefits from anyone, despite the unambiguous promise of benefits "for life."

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[6] During the term of the 1978 Agreement, the 1974 Benefit Plan was funded by a royalty of 2 cents per hour. That rate proved more than sufficient to provide benefits to orphaned pensioners for more than ten years. No contributions were required during the term of the 1981 or 1984 agreements. The eight employers involved in this case, and others similarly situated, contributed to the plan at the same rate as other signatory companies. Those contributions have provided benefits to "orphans" from other companies since 1978.

[7] Finding 34, App. 24a. The trustees, as trustees of the 1950 Benefit Plan, are contractually designated as arbitrators of health benefit disputes arising between employees or pensioners and their employers.

Prior to the expiration of the 1984 Agreement, several decisions construed the agreements and plan documents to require the 1974 Benefit Plan to provide benefits to pensioners where their last employer was no longer signatory to the collective bargaining agreement and no longer obligated to provide benefits, including *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust (Royal Coal II)*, 826 F.2d 280 (4th Cir. 1987), affirming *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556 (S.D.W.Va. 1987), the panel decision in *District 17, UMWA et al. v. Allied Corporation*, 735 F.2d 121 (4th Cir. 1984),[8] *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), and *Crockett v. Vecellio & Grogan, Inc.*, 1987 WL 60303, CA No. 1:85-1448 (S.D.W.Va. 2/4/87).

The district court also found it highly significant that the BCOA did not seek changes in the collective bargaining agreement during the 1988 negotiations, in the face of the unanimous judicial construction of the 1984 Agreement holding that retirees were entitled to benefits for life, that the obligation of the employer was limited to the term of the agreement, and that if the last employer was no longer obligated to provide benefits, the 1974 Benefit Plan must assume that responsibility. The readoption of language in the 1988 Agreement which had been extensively interpreted by the courts strongly suggests that the parties incorporated that judicial interpretation into their contract. Finding 46, App. 31a. *Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 222 (1979), *Galgay v. Gil-Pre Corporation*, 864 F.2d 1018 (3rd Cir. 1988).

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[8] The *en banc* court, on rehearing, held the employer liable based upon its breach of the successorship clause of the agreement and did not reach the issue of the 1974 Benefit Plan's obligation, but indicated in a footnote its adherence to the panel's view that the 1974 Benefit Plan would be obligated if the employer were not. 765 F.2d 413 (4th Cir. 1985).

During the 1988 negotiations, the parties were quite aware of the fact that additional pensioners would become the responsibility of the 1974 Benefit Plan by virtue of *Royal Coal II* and similar decisions. They knew that some employers had ceased operations and indicated that they did not intend to resume operations or to become signatory to the successor agreement.[9] They spent a considerable amount of time discussing the contribution rate necessary to fund the 1974 Benefit Plan, considering the additional pensioners who might become the responsibility of the 1974 Benefit Plan during the term of the 1988 Agreement.

The BCOA proposed a contribution rate of 8 cents per hour. The UMWA felt that the proposed 8 cent rate was inadequate, projecting that an 18 to 22 cent increase would be necessary to pay benefits and preserve the corpus of the trust. Ultimately, the UMWA agreed to the BCOA's proposed rate only because the BCOA agreed to continue the guarantee of benefits negotiated in the 1978 agreement, and continued in the 1981 and 1984 Agreements, which obligated them to fund the 1974 Benefit Plan to the extent necessary to provide the benefits.

As the district court found, the BCOA

> preferred to maximize cost savings by minimizing the initial contribution rate and providing additional funding later under the guarantee clause if necessary. Findings 37, 38, App. 25a-26a.

They made the same choice with respect to the 1950 Benefit Plan, and have found it necessary to increase the contribution rate for that Fund pursuant to the guarantee clause. Finding 38, App. 26a.

This litigation is largely an effort by the BCOA to avoid the obligations it knowingly undertook in the 1988 Agreement.

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[9] At least two of the employers involved in this case, Barnes & Tucker Co. and Y. & O. Coal Company, were specifically discussed. Finding 36, App. 25a.

SUMMARY OF THE ARGUMENT

The district court found that the position of the trustees was clearly wrong under either a *de novo* or an arbitrary and capricious standard of review. The BCOA's argument that there is confusion and conflict among the circuits on the appropriate interpretation of *Firestone v. Bruch* is without substance.

In this case, *de novo* review was appropriate, because the trustees do not have discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Nothing in the collective bargaining agreements or plan documents grants them such authority, and the bargaining history shows that their discretionary authority was eliminated in the 1974 Agreement.

Regardless of which standard of review is appropriate, the decision of the district court is clearly supported by the evidence, and was properly affirmed by the Court of Appeals.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE STANDARD OF REVIEW IN THIS CASE WAS *DE NOVO* REVIEW

The district court correctly determined that the appropriate standard of review of the Plan's denial of benefits was *de novo* review, under the standards established by this court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. ——, 109 S.Ct. 948 (1989).[10] *Firestone* held that the standard of review of trustees' denial of benefits under an ERISA plan is presumptively *de novo*, "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

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[10] The trial court also found that even if the standard of review is abuse of discretion, the decision of the trustees was arbitrary and capricious, as discussed *infra*.

That standard requires the trial court initially to determine whether the trustees have the type of discretionary authority which warrants a more restrictive standard of review. The district court found that the trustees have no such authority. Findings 47, App. 30a. That determination is clearly supported by the evidence in this case, as discussed at part II, *infra*.

A. There is No Conflict Among the Circuits in Applying the Standards Established in *Firestone*.

Faced with the complete unanimity of the courts which have decided the real issue involved in this appeal, the proper construction of these collective bargaining agreements and trust documents, the BCOA seeks a conflict warranting this Court's attention among the decisions of the courts of appeals since *Firestone*, construing the language of various benefit plans to determine the appropriate standard of review.

This alleged conflict between the circuits is entirely illusory. BCOA offers in support of this proposition merely different results from courts applying the same standard to different benefit plans, with different provisions and different histories. The courts must determine the appropriate standard of review on a case by case basis, construing the language and history of the specific plan at issue.

Certain principals have emerged from those decisions. One such principal is that the "discretionary authority to determine eligibility for benefits or to construe the terms of the plan" referred to in *Firestone* obviously means something more than the power to decide whether a particular beneficiary met the eligibility requirements to receive benefits. Someone must process claims and make decisions to grant or deny benefits based upon existing eligibility standards, and that authority must ultimately rest with the trustees or administrator of the plan. If that authority were sufficient to warrant a

higher standard of review, the *Firestone* standard would be meaningless, because all trustees exercise some degree of discretion in applying the provision of the plan to applications for benefits and approving or denying claims. This Court rejected Firestone's argument that an arbitrary and capricious standard should apply to its decision to deny benefits because a plan fiduciary by definition exercises some discretion.

In *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), the Court of Appeals for the Eighth Circuit stated:

> Language requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan. . . .
>
> Paragraph 16.01 of the Fund's plan provides that the trustees have the final authority to determine all matters of eligibility for the payment of claims. As noted above, this section merely describes the trustees' mandatory role in accepting or rejecting claims. It does not grant to the trustees the authority to construe ambiguous terms. We have carefully reviewed the plan and could find no other provision in the plan specifically giving the trustees the discretionary power to interpret the subrogation clause.

The Fourth and Eleventh Circuits have also held that the authority to determine whether a claimant meets the eligibility standards is not sufficient to warrant a more restrictive standard of review. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989), cert. den. 110 S.Ct. 281 (1989), *Baker v. Big Star Division of the Grand Union Company*, 893 F.2d 288 (11th Cir. 1989).

The courts have generally found the "arbitrary and capricious" or "abuse of discretion" standard appropriate only where the plan expressly gives the trustees discretionary authority to construe the plan. *Moon v.*

American Home Assurance Company, 888 F.2d 86 (11th Cir. 1989), *Brown v. Ampco-Pittsburgh Corporation*, 876 F.2d 546 (6th Cir. 1989) ("Absent a clear grant of discretion to the administrator, application of the highly deferential arbitrary and capricious standard of review does not promote" the goals of ERISA).

Where the plan clearly grants such authority, the courts have applied the arbitrary and capricious standard. *Batchelor v. IBEW Local 861 Pension and Retirement Fund*, 877 F.2d 441 (5th Cir. 1989) (Trustees "have full and exclusive authority to determine all questions of coverage and eligibility . . . full power to construe the provisions of this Agreement [and] the terms used herein"; authority to "interpret the Plan and determine all questions arising in the administration, interpretation, and application of the plan."); *Lowry v. Bankers Life and Casualty Retirement Plan*, 871 F.2d 522 (5th Cir. 1989) (Plan Committee has power to "interpret and construe" plan, "to determine all questions of eligibility and status" under plan, and committee determinations binding on all persons); *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37 (11th Cir. 1989) (trustees have "full and exclusive authority to determine all questions of coverage and eligibility", "full power to construe the provisions of the trust").

In the absence of such express grants of authority, the *Firestone de novo* standard has been followed. *Ulmer v. Harsco Corporation*, 884 F.2d 98 (3rd Cir. 1989), *Sejman v. Warner-Lambert Company*, 889 F.2d 1346 (4th Cir. 1989), *Aubrey v. Aetna Life Insurance Co.*, 886 F.2d 110 (6th Cir. 1989), *Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327 (8th Cir. 1989).

BOCA's purported conflict among the circuits rests upon the Fourth Circuit's observation in *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989) that there are "no magic words required to trigger the application of one or another standard of review." It is doubtful

that any court would disagree with that observation. However, the plan in *De Nobel* clearly gave the trustees the "power to resolve all questions pertaining to . . . *interpretation* and application of the plan." (Emphasis added.) The *De Nobel* result is entirely consistent with this Court's holding in *Firestone* and with the cases decided by the courts of appeal since that decision, including *Baxter v. Lynn, supra.* The conflict is nonexistent, and the courts of appeal are not confused about the proper application of *Firestone.*

B. Nothing in the Collective Bargaining Agreements or Trust Documents Gives the Trustees Discretionary Authority to Determine Eligibility or to Construe the Terms of the Trust.

The district court examined the collective bargaining agreements, trust documents, and the evidence of the trustees' authority, particularly the changes in 1974, and found nothing which conferred upon the trustees the authority to interpret the plan or construe disputed provisions.

The BCOA cites three provisions of the collective bargaining agreement and one provision of the benefit plan itself in support of its argument that the trustees of the UMWA 1974 Benefit Plan and Trust were granted the discretionary authority to construe or interpret the terms of the plan that would warrant review under the arbitrary and capricious standard. It made the same arguments to the district court and the court of appeals. None of these provisions, cited at pp. 16-17 of the petition, lend any support to BCOA's position.

The language of the collective bargaining agreements and plan documents does not expressly give the trustees authority to construe or interpret the terms of the plan, or to make "final determinations" about eligibility, or discretion to determine what the eligibility requirements for benefits will be.

The weakness of BCOA's argument in support of a higher standard of review is revealed by the fact that the only use of the word "discretion" it could locate has nothing to do with eligibility determination or the power to construe the plan. Article XX(e)(4) of the NBCWA is simply a routine grant of administrative authority to the trustees, authorizing them to use their discretion in determining how, when, or whether to sue to enforce the obligations of the employers, without arbitrating such disputes.

The second provision, Article XX(g)(3) is similarly a routine grant of administrative authority, authorizing the trustees to "police" the rolls and remove ineligible persons.[11]

The third provision cited, language in Article III of the benefit plan, also deals with administration, stating that

> [s]ubject to the provisions of the 1974 Benefit Trust, the trustees shall have full authority, within the terms and provisions of the Labor-Management Relations Act of 1947 and other applicable law with respect to *administration* of coverage and eligibility, methods of providing or arranging for provisions of benefits, investment of trusts funds, and all other related matters. (Emphasis added).

Again, this is simply a grant of administrative authority to manage the trust and make eligibility decisions.

The final provision relied upon by the BCOA is language in the collective bargaining agreement that the Trustees "shall determine . . . when an employer is no longer in business." This is the authority to make a factual determination as to whether an employer is no longer in business, in the same sense that they have the authority to decide if an individual claimant is eligible. All

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[11] Section (g) of Article XX is entitled "Administration of Trusts".

trustees must make factual determinations about whether the criteria of the Plan are met. Authority to make decisions about applications is not sufficient to bring the trustees within the exception to *de novo* review recognized by this Court. *Baxter v. Lynn, supra, Dzinglski v. Weirton Steel Corp., supra, Baker v. Big Star Division of the Grand Union Company, supra.*

The BCOA places primary reliance on the decisions of the Fourth Circuit in *Boyd v. Trustees of United Mine Workers Health and Retirement Funds*, 873 F.2d 57 (4th Cir. 1989) and *Richards v. UMWA Health and Retirement Fund*, 895 F.2d 133 (4th Cir. 1990), in which the court held that the trustees of the 1974 *Pension* Plan had discretionary authority and that an abuse of discretion standard was appropriate.[12] The court relied on language in the 1974 Pension Plan stating that the trustees had "full and final determination as to all issues concerning eligibility for benefits." Crucially, there is no language in the 1974 *Benefit* Plan which gives the trustees the power of "full and final determination as to all issues concerning eligibility." The only language BCOA has pointed out in Article III of the 1974 Benefit Plan is a general grant of authority to administer the trust.[13]

The question of the proper standard of review was specifically litigated in this case. The district court found that "[n]othing in the collective bargaining agreements or plan documents prescribes a more stringent standard" than *de novo* review.

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[12] Both cases involved a claims for disability pensions. In such cases, an eligibility determination involves substantial factual issues of disability and causation, necessarily entailing a greater degree of discretion. Nevertheless, in both cases the court found that the decision of the trustees was an abuse of discretion, and ruled in favor of the claimant.

[13] The *Allied* case, also cited in support of the proposition that the trustees had discretionary authority to interpret the trust, was decided four years before *Firestone* under the arbitrary and capricious standard, and lends no support to the BCOA's position.

C. The Bargaining History Demonstrates That the Trustees No Longer Had Discretionary Authority To Determine Eligibility Standards for the 1974 Benefit Plan After 1974.

From the establishment of the UMWA Funds in 1950 until 1974, there was a single United Mine Workers Welfare and Retirement Fund of 1950, governed by three trustees. The trustees had virtually complete discretion with respect to the benefits provided by the Funds. Acting by formal resolutions, the trustees established the pension and health benefits to be provided by the Fund, and modified those benefits from time to time. They established, and changed on numerous occasions, the eligibility requirements for benefits, and had a free hand in interpreting those requirements. None of those benefits were set forth in the collective bargaining agreements, which merely required signatory employers to contribute to the Funds at a given rate. The trustees created, modified, and interpreted benefits, benefit levels, and eligibility requirements at their discretion. Finding 15, App. 16a.

In the 1974 NBCWA, for the first time, the benefits to be provided were specified in the collective bargaining agreement itself and in the plan documents. The trusttees' discretionary authority to set eligibility standards for benefits was removed. Thereafter, those standards were fixed in the agreement and plan, and the trustees were charged with administering those standards. Finding 18, App. 17a.

This history was recounted by Justice Stevens in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982):

> The 1950 collective bargaining agreement established a fund to provide pension, health, and other benefits for certain miners and their dependents. That agreement defined the operators' obligation to contribute to the fund but delegated the authority to define the

> amount of benefits and the conditions of eligibility to the trustees of the fund. . . .
>
> In 1974, because of their concerns about compliance with [ERISA] and about the actuarial soundness of the 1950 fund, the union and the operators agreed to restructure the industry's benefit program. They agreed that the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in the collective bargaining agreement.

454 U.S. at 564-566.

Prior to 1974, the trustees had the type of discretionary authority contemplated by *Firestone*. When the Court stated that the proper standard was *de novo* review "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan", it was referring to the type of authority the trustees had prior to 1974. "Discretionary authority to determine eligibility for benefits" means the authority to decide what the eligibility requirements *are*, not just the authority to decide whether a particular claimant meets requirements established by the settlor and set forth in the trust documents. It is the discretionary authority to set and change the eligibility standards themselves that warrants a higher standard of review.

BCOA also argues that two practices of the trustees support their argument that the trustees have discretionary authority. One is the former practice of developing "Q & A's" on recurring questions for the guidance of funds staff in making eligibility determinations. Although, a few "Q & A's" were developed during the term of the 1978 Agreement, the practice was discontinued entirely during the 1981 Agreement. Moreover, the particu-

lar "Q & A" cited, H-16, was rejected by the settlors in the 1981 agreement.[14]

The second practice, auditing employers who claim to be out of business and making decisions about whether they are no longer in business, is an administrative function in the same sense as decisions about whether an individual claimant meets the eligibility requirements of the plan. It is a function which necessarily involves some discretion, but not the discretionary authority to construe or interpret the plan.

The audit function is necessary to determine when the trustees assume the retiree obligations of a failed employer who is still signatory to the agreement, and thus legally obligated to provide benefits, but is unable to do so. As the district court found, it is irrelevant when the employer is no longer legally obligated to provide benefits.

In this case, the trustees no longer had the discretionary authority to determine eligibility for benefits after 1974, and nothing in the collective bargaining agreement or the trust document gives them the authority to construe the terms of the trust. The district court correctly held that *de novo* review was the appropriate standard in this case.

II. THE DECISION OF THE DISTRICT COURT WAS SUPPORTED BY THE EVIDENCE UNDER EITHER STANDARD OF REVIEW.

BCOA argues that the district court applied the wrong standard of review in this case in the hope that this issue may provide one more opportunity to retry the facts before this Court.

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[14] Funds staff attempted to develop a replacement "Q & A" in 1981 and early 1982, but never completed the process. The practice itself was abandoned soon thereafter.

Even if the Court should determine that the appropriate standard of review in this case is the abuse of discretion or arbitrary and capricious standard, the district court found in the alternative that the decision of the trustees to deny benefis to the pensioners in this case was arbitrary and capricious. Findings 47, 50, 51, App. 11a, 30a-31a.

As noted by the district court, the position of the trustees was also held to be arbitrary and capricous by the courts that addressed the issue prior to *Firestone*, applying the arbitrary and capricious standard then followed by most of the circuits. *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556, 1567 (S.D. W.Va. 1987), affirmed *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), cert. den. 485 U.S. 935, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988), *Schifano v. UMWA 1974 Benefit Plan and Trust*, 655 F. Supp. 200 (N.D.W.Va. 1987), *Grubbs v. UMWA 1974 Benefit Plan and Trust*, 723 F. Supp. 123 (W.D.Ark. 1989).

A. The District Court Correctly Found that the Parties Intended to Confer a Vested Right to Lifetime Health Benefits.

Although ERISA does not impose any minimum vesting requirements with respect to employee welfare benefit plans, the statute evidences no intent by Congress to endorse unfettered termination of benefits such as those provided pursuant to the NBCWA. This court has said, in a case involving the same benefits at issue here, that retiree health benefits may be vested, and if they are vested, may not be altered without the consent of the retiree. *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562, n.14 (1982), *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Whether pensioners are entitled to health benefits as a vested, lifetime benefit depends upon the intent of the

parties to the collective bargaining agreement which creates the benefit.[15]

The past five collective bargaining agreements between the UMWA and the BCOA, provide that a pensioner "will be *entitled* to retain a health services card *for life.*" (Emphasis added). It is difficult to perceive how an intent to create a lifetime benefit could be expressed more clearly. The district court, and the other courts that have previously addressed the issue, found that the quoted language and the history of these benefits clearly demonstrated the intent of the parties to confer a right to benefits for the lifetime of the pensioner. Finding 40, App. 27a. *District 29, UMWA v. UMWA 1974 Benefit Plan*, 826 F.2d 280, 282-283 (4th Cir. 1987), *District 29, UMWA v. Royal Coal Company*, 8 EBC 1556, 1563 (S.D.W.Va. 1987), *Crockett v. Vecellio & Vecellio & Grogan, supra, Grubbs v. UMWA 1974 Benefit Plan*, 723 F. Supp. 123, 127 (W.D.Ark. 1989).

The argument of the BCOA that this language is meaningless is untenable. The BCOA's chief negotiator testified at trial that BCOA had attempted, without success, to remove that language "many times," including the attempt to remove it from the 1978 Agreement. If the health services card referred to in the summary "no longer exists" as a result of the 1978 negotiations, the current version of the "for life" language would not have been reinserted in the 1978 Agreement at the insistence of the UMWA after it was omitted from a BCOA draft. Finding 21, App. 19a. A general disclaimer that the

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[15] See, *International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. den., 465 U.S. 1007 (1984), *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987), *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *Local Union No. 150A, UFCW v. Dubuque Packing*, 756 F.2d 66 (8th Cir. 1985), *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984), *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988).

description of benefits included in the contract is "subject to more detailed information" in the plan is insufficient to nullify the clear promise of benefits for these pensioners.[16]

B. The Position of the BCOA is Inconsistent With the Intent to Provide Lifetime Benefits.

The district court recognized that there is an irreconcilable contradiction between the clearly expressed intent to provide lifetime benefits in the collective bargaining agreements and the position taken by the trustees and the BCOA. The BCOA's interpretation of the agreement would effectively defeat the clear intention of the parties to provide lifetime benefits. Finding 51, App. 31a.

This fundamental contradiction is inescapable. These pensioners last worked and retired at a time when their employer was still signatory to the NBCWA. At that point, they had done everything necessary to qualify for their retirement benefits. They had earned their pensions and health benefits by their years of service in the coal industry, and under the plain language of the agreements, had every right to expect that they would receive them. Those benefits were fully vested.

The BCOA relies entirely upon language first included in the 1981 Agreement providing that an employer is considered "no longer in business" only if it has ceased

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[16] The words "for life" or their equivalent appear eight times in each agreement, describing benefits for different categories of beneficiaries. The "General Description of Plan Benefits" is included in the collective bargaining agreements as an appendix to Article XX, the article creating and funding the pension and benefit plans. Tentative agreements reached between the UMWA and BCOA are submitted to the union membership for ratification by the rank and file, and copies of the agreements with highlighted changes, are distributed for review prior to the ratification vote. BCOA's position is evidently that the apparent promise of lifetime benefits contained in those agreements is merely a cynical deception to win approval of those agreements.

mining operations and is financially unable to provide benefits. App. 13a-14a. It interprets that language to deny coverage to pensioners whose employers may be able to provide benefits, regardless of whether the employer is legally obligated to do so, in effect working a forfeiture of benefits from any source for those retirees whose employers cease mining operations, cease employing UMWA members, and do not become signatory to successor collective bargaining agreements.

The district court rejected the BCOA's interpretation of that language, finding that the intent of the provision was to protect the 1974 Benefit by insuring that responsible employers fulfilled their obligations to provide benefits during the term of the agreement, but not to create gaps in coverage where pensioners would lose their benefits because neither the employer nor the 1974 Benefit Plan was obligated to provide them. Findings 29, 43, App. 22a, 28a.

The district court found that

> It is clear that both parties, in adopting the language, presupposed that the employer was obligated to provide benefits and intended to ensure during the term of the agreement that the employer rather than the 1974 Benefit Plan would pay benefits unless unable to do so. Our conclusion is reinforced by the fact that the "no longer in business" clause refers to *signatory* employers, indicating that the 1974 Benefit Plan must provide benefits to retired miners who
>
> > . . . would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory employer, including successors and assigns . . . is no longer in business.
>
> A signatory employer is obligated to provided benefits for the term of the contract to which it is signatory regardless of whether it has any operations covered by the contract, i.e., coal mining operations. App. 28a-29a.

The position of the BCOA is that those benefits are forfeited because their employer is no longer signatory to a collective bargaining agreement with the union, an event which occurred after their retirement and which was entirely beyond their control.

If the Agreements contemplate that possibility, then no pensioner would ever be "entitled to a health services card for life." A pensioner's benefits would always be limited, contingent, and subject to forfeiture at any time. He would have no assurance of receiving what the agreements promise.

The BCOA's interpretation presupposes that at some point in the history of the collective bargaining relationship between the UMWA and the BCOA, the Union agreed to this fundamental change in the nature of these benefits. For some 28 years prior to 1978, those benefits were provided for life. The district court found nothing in the 1978 or 1981 agreements or the bargaining history which indicated any intent to make such a drastic change in the nature of the benefits provided by the agreement. Indeed, the assurance that only the delivery mechanism was being changed and not the nature of the benefits themselves was a vital element of the 1978 Agreement. The court found no persuasive evidence of any intent to cause a forfeiture of benefits under these circumstances. App. 27a-28a.

The BCOA's position also requires the assumption that the Union agreed to condition the receipt of vested benefits upon the financial condition of a pensioner's last employer, regardless of whether that employer was obligated to provide benefits. That assumption makes no sense. As the court observed in *Grubbs v. UMWA 1974 Benefit Plan, supra,*

> In light of the decades of history of the intent of the parties which were relied upon in establishing the current benefit and pension scheme to provide for disabled and retired miners in the twilight of their

> lives, it is obvious that none of the interested parties intended to condition the receipt of benefits on facts completely irrelevant to the receipt of the benefits. To condition receipt of pension and health benefits on the financial condition of an employer that has no legal obligation to pay those benefits is as incomprehensible as rendering the fruits of lifelong toil contingent upon the amount of annual rainfall in Siberia.

The district court found no support in the record for that contention. Finding 43, App. 28a-29a.

C. Review by This Court is Not Necessary to Preserve the Existence of the Plan.

BCOA's final assertion is that the district court's decision will, sooner or later, destroy the 1974 Benefit Plan. That assertion is without foundation.

While the crisis of escalating health care costs is real enough, particularly in basic industries with large numbers of retirees entitled to health benefits and declining employment, that problem may be beyond the ability of private parties to resolve in their collective bargaining agreements.[17] However, to the extent that such agreements can anticipate and make provisions for adequate funding, the parties to the NBCWA have done so.

The UMWA negotiated the guarantee of benefits in 1978 specifically to ensure that pensioners received the benefits to which they were entitled. The BCOA agreed to renew that guarantee in the 1981, 1984, and 1988 Agreements, although frequently taking the initial position during negotiations that it would no longer agree to guarantee benefits.

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[17] The Dole Commission is currently examining the long term problems of providing health care in the coal industry. The 1950 Benefit Plan is a much larger problem than the 1974 Plan, with some 110,000 beneficiaries, ten times the size of the 1974 Plan.

The immediate funding crisis in both the 1950 and 1974 Benefit Plans is entirely manufactured by the BCOA, by its refusal to honor its unconditional guarantee and increase contributions to a level adequate to fund the benefits. Although fully aware of the plans' actual and potential liabilities, it chose to minimize the initial contribution rate in the agreement, promising to provide additional funding as required.[18] It has refused to provide that funding, requiring the trustees to sue to enforce the guarantee.[19]

BCOA further argues that the district court's decision will encourage "dumping" of retiree obligations on the 1974 Benefit Plan by some employers. The Union made proposals in both 1984 and 1988 to prevent that problem. The proposals offered in 1984 would have placed the obligation to provide these benefits on the very employers the BCOA now complains are "dumping" their obligations on the 1974 Benefit Plan. The BCOA employers declined to agree to that proposal because they wanted to limit their own liability to the term of the agreement. In 1988, the Union proposed and the BCOA accepted contractual provisions for withdrawal liability for employers who withdraw from participation in the 1974 Benefit Plan. To the extent that the problem exists, it has been created largely by the BCOA's own bargaining position.

CONCLUSION

The BCOA accuses the district court of choosing a desired social result and bending the facts and the law to fit that result. Nothing could be further from the

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[18] BCOA is authorized by the agreement to increase contribution rates for all signatory employers in order to implement the guarantee of benefits.

[19] See, *United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators Association*, 890 F.2d 177 (D.C. Cir. 1990). Similar litigation has now been filed on behalf of the 1974 Benefit Plan, and the district court has granted preliminary injunctive relief requiring additional contributions.

truth. The district court's opinion carefully examined the agreements and bargaining history of the parties, recognized the fundamental problems with the BCOA's interpretation of the evidence, and found that the evidence supported the position of the UMWA and the individual pensioners that they were entitled to benefits and that the 1974 Benefit Plan was continued in 1978 for the purpose of ensuring that pensioners received the benefits they were promised. The district court's conclusions were fully in accord with the opinions of every other court which has construed those documents and examined that bargaining history, and fully consistent with governing precedent.

BCOA also complains of the "short shrift" its appeal received from the Court of Appeals. It is evident that the Third Circuit simply recognized the appeal for what it was: an effort to reargue the facts found by the district court, presenting no legitimate or significant question of law.

The decision of the district court was clearly supported by the evidence, and was properly affirmed by the Court of Appeals. The petition for certiorari should be denied.

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No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The trustees of the 1974 United Mine Workers Benefit Plan and Trust denied coverage to a class of retired miners. The question presented is whether, in applying this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the district court properly reviewed the decision of the trustees under a de novo standard.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-464

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner, the Bituminous Coal Operators' Association (BCOA), is a multi-employer bargaining association. About every three years for the last 40 years, it has negotiated a collective bargaining agreement with respondent United Mine Workers of America (UMWA). That agreement, known as the National Bituminous Coal Wage Agreement (NBCWA), governs the terms and conditions of employment of the coal miners employed by members of the BCOA and the companies that sign "me too" agreements with the UMWA. Pet. App. 11a-12a.

In 1950, the BCOA and the UMWA established in the NBCWA the United Mine Workers Welfare and Retire-

ment Fund. Pet. App. 15a.[1] This Fund provided pension and health benefits for active and retired miners "throughout the life of the miner." *Id.* at 16a (district court's characterization). The Fund was governed by a board of three trustees—a BCOA-appointed trustee, a UMWA-appointed trustee, and a mutually selected neutral trustee. Under the terms of the 1950 Trust, the trustees had complete discretion over eligibility requirements and the nature and level of benefits. *Ibid.*

In 1974, the BCOA and the UMWA agreed to restructure the Fund by creating four separate plans: the 1950 Pension Plan, the 1950 Benefit Plan, the 1974 Pension Plan, and the 1974 Benefit Plan.[2] The 1974 Benefit Plan, which is at issue in this case, was established to provide health and other non-pension benefits to active miners and to pensioners who retired after January 1, 1976, and were eligible to receive pension benefits from the 1974 Pension Plan. Unlike the prior collective bargaining agreements, the 1974 NBCWA set forth in specific terms the eligibility requirements for the benefits to be provided to miners, pensioners, and their dependents. Pet. App. 16a-17a; see *Robinson*, 455 U.S. at 566. The grant of authority to the trustees was correspondingly limited to "full authority * * * with respect to *administration* of coverage and eligibility." Pet. 17 (emphasis added).[3]

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[1] The Fund was created pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5). See *UMW Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 564-566 (1982). Employees and employers must be equally represented in the administration of a fund established under Section 302(c)(5), but may agree upon one or more neutral representatives to serve as trustees. 29 U.S.C. 186(c)(5)(B); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-329 (1981).

[2] In part, the restructuring was designed to comply with the recently enacted Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 16a. The 1974 Benefit Plan and Trust is an employee welfare benefit plan within the meaning of Section 3(1) of ERISA. 29 U.S.C. 1002(1). Pet. App. 12a.

[3] Article III of the trust document states:

> Subject to the provisions of the 1974 Benefit Trust, the Trustees shall have full authority, within the terms and provisions of

In 1978, following a 111-day strike in which the continuation of health benefits was the central issue (see Pet. App. 17a-18a), the BCOA and the UMWA agreed that health benefits for active miners and post-1975 retirees would be provided by individual companies. The 1978 agreement also provided that the 1974 Benefit Plan would continue to exist to provide benefits to "any retired miner under the 1974 Pension Plan * * * who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) is no longer in business." Pet. App. 18a.[4] The agreement did not specify who would provide benefits to persons who had retired from companies that would become non-signatory employers by failing to sign subsequent wage agreements with the UMWA.

2. After the 1978 restructuring, a number of courts held that non-signatory employers were not obligated to provide benefits to their retirees, but that the 1974 Benefit Plan provides a "safety net" for those "orphaned" retirees. Thus, in *District 29, UMW* v. *Royal Coal Co.* (*Royal I*), 768 F.2d 588, 589 (1985), the Fourth Circuit held that a company that had been signatory to the 1978 and 1981 agreements, but had ceased all mine operations and did not sign the 1984 agreement, was not obligated to pay the health benefits of its former employees beyond the expiration of the earlier agreements, even though they had retired during the terms of those agreements.

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the Labor-Management Relations Act of 1947, and other applicable law[,] with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds and all other related matters.

[4] The 1981 agreement and subsequent agreements specify that "no longer in business" means that the employer "has ceased all mining operations" and "is financially unable * * * to provide health and other non-pension benefits to its retired miners and surviving spouses" either directly or through any successors, assigns, or related subsidiary or parent corporations. Pet. 6-7 & n.4; see Pet. App. 21a-22a.

Accord *District 17, UMW* v. *Allied Corp.* (*Allied I*), 735 F.2d 121, 124, 133, rev'd on other grounds, 765 F.2d 412 (4th Cir. 1984) (en banc) (*Allied II*), cert. denied, 473 U.S. 905 (1985); *Box* v. *Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986). After a remand, the Fourth Circuit held that "the 1974 Benefit Plan must provide health benefits where the successor corporation of the former employer is financially able to provide benefits, but is not legally obligated to do so because it is not a signatory to the wage agreement." *District 29, UMW* v. *UMW 1974 Benefit Plan & Trust* (*Royal II*), 826 F.2d 280, 282 (1987), cert. denied, 485 U.S. 935 (1988). The court concluded "that the intentions of the parties in providing for retirement health benefits was to guarantee their provision for life." 826 F.2d at 282.[5] The Fourth Circuit thus held that the 1974 Benefit Plan must assume health and benefit obligations when the employer's legal obligations have ceased (as set forth in *Royal I*), even if its parent or successor is financially able to pay and therefore is "in business" as defined in the wage agreement. *Id.* at 283.[6]

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[5] The Fourth Circuit based this finding on the general description in each of the succeeding wage agreements that "pensioners who retire before the effective date of each collective bargaining agreement are entitled to health benefits 'for life' and their widows 'until death or remarriage.'" 826 F.2d at 282. Thus, "[d]espite the patent limitation of the liability of the 1974 Benefit Plan and Trust to provide health benefits only 'during the terms of this agreement,' and only where the individual employer is 'no longer in business'" (*ibid.*), the court concluded that "[i]t is apparent from the record that the parties, in moving from a system wherein the health benefits were provided solely by the collective 1974 trust to a regime in which individual employers assumed primary liability, intended to change the method of providing health benefits, but they did not intend to create new, latent loopholes to coverage." *Id.* at 283.

[6] A cord *Grubbs* v. *UMW*, 723 F. Supp. 123 (W.D. Ark. 1989); *Schifano* v. *UMW 1974 Benefit Plan & Trust*, 655 F. Supp. 200 (N.D. W. Va. 1987); see *District 29, UMW* v. *Royal Coal Co.*, 8 Employee Benefits Cas. (BNA) 1556, aff'd, 826 F.2d 280 (4th Cir. 1987), cert. denied, 485 U.S. 935 (1988).

3. This case arose out of a decision by the trustees of the 1974 Benefit Plan to deny coverage to a class of retired or disabled miners (or their dependents) whose last coal mine employers were eight companies that had been signatories to the NBCWA until either 1981 or 1984. Following their decisions not to sign the more recent agreements, these companies either remained in the coal business as non-union employers or otherwise were financially able to provide the benefits either directly or through a related division, parent or subsidiary corporation, or through a successor or assign. Pet. App. 10a-11a, 13a-15a.[7]

The district court stated that "[w]hether the pensioners at bar are entitled to health benefits as a vested, lifetime benefit depends on the intent of the parties to the collective bargaining agreement." Pet. App. 26a, citing, *e.g.*, *International Union, UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), cert. denied, 465 U.S. 1007 (1984). Characterizing the case as "a straight-forward factual dispute," the court extensively reviewed the collective bargaining history and the resulting agreements and plan documents from 1950 through 1988. Pet. App.

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[7] The courts below consolidated four separate actions. See Pet. App. 1a-7a. Individuals who had been employed by one of the eight companies brought suit, along with their collective bargaining representative, in three of the actions "seek[ing] injunctive relief to compel the 1974 Benefit Plan to provide health and other non-pension benefits, pay all unpaid medical bills and establish an escrow fund to insure payment of such benefits." *Id.* at App. 12a; see *id.* at 11a. The trustees of the 1974 Benefit Plan filed the fourth action, seeking a declaratory judgment to determine its responsibility to provide health benefits to those individuals. *Id.* at 14a. The BCOA intervened and asked for class certification of the individual plaintiffs under Fed. R. Civ. P. 23(b)(2). The district court certified a class of more than 2,100 persons, defined as pensioners, retired or disabled miners, and their spouses and dependents who are or were eligible for benefits under the 1974 Pension Plan and who were employed by non-signatory companies that had signed the NBWA of 1978, 1981, or 1984. The class excludes persons whose last signatory employer's operations were principally within the jurisdiction of the Fourth Circuit. Pet. App. 40a-42a, 53a-55a.

10a; see *id.* at 15a-26a. It noted in particular that in 1978 "the BCOA proposed to eliminate the language contained in the 1974 Agreement that pensioners and disabled miners would retain a health services card 'until death' or 'for life,' and widows 'until death or remarriage,'" but the UMWA refused to eliminate the language and substantially similar language was inserted into the General Description of Plan Benefits in 1978, 1981, 1984, and 1988. *Id.* at 19a. The court further found that the parties were aware, when they negotiated the 1988 NBCWA, of the judicial holdings in favor of 1974 Benefit Plan coverage for the pensioners of former signatory employers. *Id.* at 25a.[8]

In light of this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the district court held that "the appropriate standard of review of the Trustees' decision to deny benefits to these pensioners appears to be *de novo* review." Pet. App. 30a. The court reasoned that neither the collective bargaining agreements nor the plan documents prescribe a different standard; to the contrary, "[s]ince the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust." *Ibid.*

Applying a de novo standard, but stating that application of an 'arbitrary and capricious" test would lead to the same result (Pet. App. 30a), the court discerned a consistent intent to provide lifetime health benefits to the plaintiff class from the language of the past five wage agreements, the 25-year history of lifetime benefits before 1974, and the testimony of the parties to the NBCWA. The court found "no persuasive evidence that

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[8] The court observed that in 1988 the BCOA agreed to increase its contribution to the 1974 Benefit Plan from five to eight cents an hour, and promised that "additional money would be forthcoming if necessary." Pet. App. 25a. The court also observed that the parties agreed in 1988 to require employers who ceased to contribute to the 1950 and 1974 Benefit Plans to pay withdrawal liability to the plans. *Id.* at 25a-26a.

the parties intended to cause the forfeiture of benefits or to create a gap in coverage where an employer is not legally obligated to provide benefits to these pensioners.' *Id.* at 27a.

The court also found that "the collective bargaining agreements and the plan documents are ambiguous concerning whether the employer or the 1974 Benefit Plan is obligated to provide such benefits when the employer is no longer a signatory to the collective bargaining agreement." Pet. App. 27a. However, it determined that the parties never intended to divest pensioners of their rights "in favor of a scheme that would condition receipt of benefits upon the financial condition of an entity that [as a non-signatory] has no obligation to pay benefits." *Id.* at 29a.[9] In addition, citing the *Allied* and *Royal* decisions among others, the court noted that, "[w]ithout exception," the courts had held that an individual employer's obligation to provide health benefits did not extend beyond the term of the collective bargaining agreement to which it was signatory, but that the 1974 Benefit Plan was responsible for such benefits, regardless of the financial status of the employer, where the employer was no longer legally obligated to make payments. *Id.* at 29a-30a. The court concluded that "[t]he readoption of the language in the 1988 Agreement confirms that the judicial interpretations correctly represent the intent of the parties." *Id.* at 30a.

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[9] In response to petitioner's argument that the 1974 Benefit Plan was to provide benefits only to employees whose former employers were "no longer in business," the court observed that the language of the agreement referred to "*signatory* employer[s]" who were no longer in business. Pet. App. 28a. The court also noted that the "no longer in business" language was amended in 1981, without dissent from the union. The purpose of the amendment, the court said, was "to prevent employers from avoiding their obligations to their pensioners during the term of the agreement—not to deprive pensioners of their benefits upon the happening of contingencies entirely beyond their control." *Ibid.* The court concluded that the amendment was never intended to exclude any class of pensioners from coverage, since the union would surely have objected to a change of that magnitude.

The district court therefore held that the trustees had erroneously interpreted the NBCWA and plan documents "to preserve the corpus of the trust at the expense of the intended beneficiaries." Pet. App. 30a. It further held that under the terms of the 1988 NBCWA (Art. XX(h)), the signatory employers must "fully guarantee the solvency of the 1974 Benefit Plan with appropriate contributions." *Id.* at 31a. Accordingly, it ruled on the merits in favor of the individual plaintiffs and the UMWA. After further concluding that the plaintiffs had shown that they otherwise would suffer irreparable harm and that neither the BCOA nor the Plan would be substantially harmed, the court granted permanent injunctive relief to the plaintiff class. See *id.* at 48a-51a.[10]

On the BCOA's appeal, the court of appeals summarily affirmed without opinion. Pet. App. 1a-8a.[11]

DISCUSSION

Contrary to petitioner's primary contention, there is no conflict in the circuits on the appropriate standard of review. Moreover, the district court correctly reviewed the decision at issue under a de novo standard. Further review by this court is therefore not warranted.

1. Petitioner (Pet. 14) asks this Court to "clarify when and under what circumstances courts should defer to eligibility determinations by plan trustees following this Court's *Firestone* decision." To do so would be carrying coals to Newcastle. The issue of when trustees are entitled to deferential judicial review was precisely the one decided less than two years ago in *Firestone.*

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[10] As an alternative holding with respect to the trustees, but not the BCOA, the court determined (Pet. App. 32a, 34a) that the trustees were collaterally estopped from relitigating the issue of 1974 Benefit Plan responsibility for employees of non-signatory employers, since that issue had been decided adversely to them in *Royal II, Schifano,* and *Crockett* v. *Vecellio & Grogan, Inc.,* No. 85-1448 (S.D. W.Va. Feb. 4, 1987).

[11] The 1974 Benefit Plan trustees did not appeal from the district court's judgment.

What is more, we do not discern any state of confusion among the courts of appeals that would warrant further consideration at this time.

Before *Firestone*, a conflict existed among the circuits as to the appropriate standard of review. 489 U.S. at 107-108. Most courts applied the "arbitrary and capricious" standard of review; a few courts undertook heightened review under that standard when fiduciaries or administrators had some bias or adverse interest; and others applied de novo review in such conflict-of-interest cases. *Id.* at 107; see, *e.g.*, *Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1049-1050 (7th Cir. 1987) (collecting cases); *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134, 138-140 (3d Cir. 1987) (same), aff'd in relevant part, 489 U.S. 101 (1989).

This Court's decision in *Firestone* significantly changed the legal landscape. The Court held that "a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. The Court rejected as unwarranted "the *wholesale* importation of the arbitrary and capricious standard" into ERISA from analogous Labor-Management Relations Act (Section 302(c)(5)) cases. 489 U.S. at 109. Instead, the Court stressed that, in determining the appropriate standard of review, it was "guided by principles of trust law." *Id.* at 111. Those principles pointed toward a de novo standard, since courts would construe trust agreements, like other contracts, without deferring to either party unless the trust instrument gave the trustee discretion to construe uncertain terms. *Id.* at 111-113.

In this regard, the Court noted that, prior to ERISA, courts reviewed employee benefit claims under a de novo standard "by looking to the terms of the plan and other manifestations of the parties' intent," and observed that an arbitrary and capricious standard "would afford less

protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," a result not likely contemplated by Congress. 489 U.S. at 113, 114. Thus, the Court concluded that in the absence of a grant of discretionary authority to the trustees, a de novo standard "applies regardless of whether the plan at issue is funded or unfunded [or] whether the administrator or fiduciary is operating under a possible or actual conflict of interest." *Id.* at 115.[12] The Court noted, however, that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' " *Id.* at 115, citing Restatement (Second) of Trusts § 187, Comment d (1959).

Since *Firestone*, there have been approximately 70 court of appeals' decisions applying, and in many instances discussing, the *Firestone* test; so far, all but the District of Columbia and Tenth Circuits have had occasion to invoke it.[13] To our knowledge, no court has indi-

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[12] In response to the argument that a de novo standard would lead to much higher administrative costs and increased litigation, the Court stated that benefit denials are subject to judicial review in any event, that parties can foreclose de novo review by agreeing on a narrower standard, and that "as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard." 489 U.S. at 114-115.

[13] See, *e.g.*, *Curtis* v. *Noel*, 877 F.2d 159, 161 (1st Cir. 1989); *Heidgerd* v. *Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990); *Anderson* v. *Pittsburgh-Des Moines Corp.*, 893 F.2d 638, 639 (3d Cir. 1990); *DeWitt* v. *State Farm Ins. Cos. Retirement Plan*, 905 F.2d 798, 800-801 (4th Cir. 1990); *Cathey* v. *Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558-559 (5th Cir. 1990); *Perry* v. *Simplicity Engineering*, 900 F.2d 963, 965 (6th Cir 1990); *Fuller* v. *CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990); *Johnson* v. *Enron Corp.*, 906 F.2d 1234, 1237-1238 (8th Cir. 1990); *Jones* v. *Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 481 (9th Cir. 1990); *Anderson* v. *Blue Cross/Blue Shield*, 907 F.2d 1072, 1075-1076 (11th Cir. 1990). Most, if not all, of these cases began before *Firestone*, and many had been decided by the district courts under a pre-*Firestone* standard. The courts have uniformly held, however, that *Firestone*

cated that the test is at all unworkable, unduly rigid, or vague, or that it leads to irrational results. To the contrary, the general view appears to be that, on the central issue of whether to apply a de novo standard or a more deferential standard of review, *Firestone* conveys "an admonition to courts that they refer to the common law of trusts for guidance in ERISA decisions." *Exbom* v. *Central States Health & Welfare Fund*, 900 F.2d 1138, 1142 (7th Cir. 1990).[14]

Nor have the courts of appeals diverged in applying *Firestone*'s presumption in favor of de novo review. As the Fifth Circuit has summarized, "[n]ot surprisingly, post-[*Firestone*] litigation has focused upon the language of ERISA-regulated plans and whether the instruments vest discretionary authority concerning entitlements with the fiduciary or administrator." *Cathey* v. *Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 558 (5th Cir. 1990). That court emphasized that courts have consistently applied a de novo standard in the absence of clear evidence showing that a more deferential standard is warranted (*id.* at 559):

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applies to pending cases. See, *e.g.*, *Perry*, 900 F.2d at 965 n.2; *Michael Reese Hosp. & Medical Center* v. *Solo Cup Employee Health Benefit Plan*, 899 F.2d 639, 641 (7th Cir. 1990); *Orozco* v. *United Air Lines, Inc.*, 887 F.2d 949, 952-954 (9th Cir. 1989) (per curiam).

[14] The court in *Exbom* expressed uncertainty as to whether the post-*Firestone* abuse of discretion standard is identical to the pre-*Firestone* arbitrary and capricious standard. See 900 F.2d at 1142; *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525 (5th Cir.) (per curiam), cert. denied, 110 S. Ct. 152 (1989). The Eleventh Circuit has stated that it considers the two standards to be interchangeable. *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1558 n.1 (1990), cert. denied, 111 S. Ct. 712 (1991); see *id.* at 1560 n.4. Other subsidiary issues that have elicited judicial comment in the aftermath of *Firestone* concern how conflict of interest is to be considered under an abuse of discretion standard, see, *e.g.*, *Brown*, 898 F.2d at 1563 n.6, 1568, and whether the reviewing court is limited to the facts before the trustees or administrator in applying the de novo standard, see *Perry*, 900 F.2d at 966-967; *Moon* v. *American Home Assur. Co.*, 888 F.2d 86 (11th Cir. 1989). None of those questions is presented here.

> The courts of appeals that have considered, since [*Firestone*], the discretion granted by ERISA instruments consistently have rejected the argument that discretionary authority can be *implied* from the instrument's language. *See, e.g., Moon* v. *American Home Assur. Co.*, 888 F.2d 86, 88 (11th Cir. 1989); *Orozco* [v. *United Air Lines, Inc.*, 887 F.2d 949,] 952 [(9th Cir. 1989) (per curiam)]; *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989). * * * Accordingly, 'the circuit courts which have found that particular ERISA plans granted discretion to plan administrators or fiduciaries, * * *, have uniformly rested this finding upon *express language* of the ERISA plan before them.' *Moon*, 888 F.2d at 88.

Thus, when presented with express plan language that unambiguously confers discretion to construe the terms of a plan, courts have not hesitated to apply an abuse of discretion standard. See, *e.g., Fuller* v. *CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) ("The Board's plan, however, empowers the trustees 'to construe and interpret the plan.' * * * [T]his language brings a plan within *Firestone*'s exception for plans whose trustees are empowered to construe doubtful or contested terms—what else could the language we have quoted mean?"); *DeWitt* v. *State Farm Ins. Cos. Retirement Plan*, 905 F.2d 798, 801 (4th Cir. 1990); see also Pet. 21-22 & n.11 (citing cases).

The *Firestone* test is, of course, most easily applied when the plan language is unambiguous. On the other hand, courts confronted with ambiguous delegations of authority have engaged in some fine line-drawing. "A plan containing no provisions about construction accordingly leads to *de novo* review, while a plan expressly granting the trustee leeway yields deferential review. Not surprisingly, most plans, drafted before *Firestone*, are in between." *Sisters of the Third Order of St. Francis* v. *SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990). The Seventh Cir-

cuit observed that "[c]ourts predictably have divided over the characterization of such ambiguous language." *Ibid.*, comparing *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1186-1187 (4th Cir. 1989); *Curtis* v. *Noel*, 877 F.2d 159, 161 (1st Cir. 1989); and *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 524-525 (5th Cir.), cert. denied, 110 S. Ct. 152 (1989), treating similar plan language as granting discretion sufficient to require deferential review, with *Baxter* v. *Lynn*, 886 F.2d 182, 187-188 (8th Cir. 1989); and *International Bhd. of Elec. Workers, Local 47* v. *Southern Cal. Edison Co.*, 880 F.2d 104, 108 (9th Cir. 1989), construing similar language as leading to de novo review.

The Seventh Circuit's observation, however, falls far short of the suggestion (Pet. 22) that *Firestone* has engendered two distinct and divergent lines of cases.[15] The most that can be said is that various courts, applying the same legal test to similar but not identical facts, have occasionally reached different conclusions. That should come as no surprise; indeed, that result is characteristic of judicial construction of ambiguous contract language. But the pertinent point is this: the cases do not reveal the need for further illumination to guide the courts; rather, the substantial outpouring of post-*Firestone* decisions simply confirms that "the indicia of discretionary authority granted to administrators or fiduciaries will differ with each ERISA plan reviewed by a given court." *Baker* v. *Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 292 (11th Cir. 1990). Moreover, discretionary authority over some matters does not connote equivalent authority over all matters. Thus, a given fiduciary may have the requisite discretionary authority "to determine eligibility for benefits," but not otherwise "to construe

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[15] By petitioner's analysis, the alleged "confusion" (Pet. 20) among the courts of appeals is as much intra-circuit as inter-circuit, since petitioner characterizes the Fourth Circuit's decision in *De Nobel* as falling into one line of cases, and the Fourth Circuit's decision in *Dzinglski* v. *Weirton Steel Corp.*, 875 F.2d 1075, cert. denied, 110 S. Ct. 281 (1989), as falling into the other line.

the terms of the plan," and vice versa.[16] It is therefore not inappropriate, as petitioner urges in describing a so-called "second line of post-*Firestone* authority" (Pet. 22-24), for a court to consider both the delegation language itself and the nature of the particular trustees' decision in order to determine whether the decision falls within the scope of broadly delegated authority.[17]

Furthermore, any difficulty courts may have experienced in applying *Firestone* to the universe of plan lan-

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[16] In addition, in determining the breadth of delegated authority, a court may appropriately consider extrinsic evidence of intent when construing ambiguous plan language. As this Court explained, "[t]he terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'" *Firestone*, 489 U.S. at 112 (quoting Restatement (Second) of Trusts § 4, Comment d (1959)).

[17] Viewed in this light, petitioner's two lines of cases are reconcilable, despite their different outcomes. In *Baxter*, 886 F.2d at 188, which involved interpretation of the plan's subrogation provision, the court stated that "[l]anguage requiring trustees to make a final determination of an employee's eligibility under the plan does not necessarily confer discretionary authority to render decisions with regard to ambiguous provisions of the plan." Although the plan in question gave the trustees "final authority to determine all matters of eligibility for the payment of claims" (court's paraphrase), it did not grant the authority to construe ambiguous terms; and the court therefore held de novo review to be appropriate for the latter function. *Ibid.* Similarly, in *Dzinglski*, 875 F.2d 1075, the court applied de novo review because the trustees did not base their denial of benefits on their admitted discretion to determine eligibility but rather on an exercise of the employer's management prerogative to deny early retirement status—a matter over which the trustees had no discretion. By contrast, in *De Nobel*, 885 F.2d at 1186 (emphasis added), the court reviewed the administrators' decision under a deferential standard because the plan clearly gave the administrators "broad discretion to pass on *precisely the sort of 'interpretive' questions* [regarding method of benefit payment] that led to the present dispute." And in *Lowry*, 871 F.2d at 524-525 (emphasis added), the court said that "the unambiguous language in the Plans mandates deference to the plan administrators *under the circumstances of this case*," thus prompting deferential review.

guage is likely to abate. Courts thus far have construed only plans written before *Firestone* made the precise terms of the delegated authority determinative of the standard of review for benefit denials. *Sisters*, 901 F.2d at 1371. Since *Firestone* does not "foreclose[] parties from agreeing upon a narrower standard of review" or, for that matter, making explicit that they intend that the decisions of trustees will be reviewed de novo, 489 U.S. at 115, that decision should encourage parties to amend plan documents to clarify their intentions with respect to the nature and scope of discretionary authority. Thus, any uncertainty reflected in the cases may simply be part of a transitional phase of post-*Firestone* law.[18]

2. The standard of review was not a primary focus of the courts below. Nonetheless, the district court considered the relevant factors when it determined that *Firestone* requires application of a de novo standard in this case. The court looked to the collective bargaining agreements and plan documents to discern whether they provided for a deferential standard. The court found no such provision; rather, it found that "[s]ince the restructuring of the Funds in 1974, the Trustees are without discretionary authority to establish eligibility standards or to construe the terms of the trust." Pet. App. 30a. We cannot fault either the court's mode of analysis or its conclusion.

If the 1974 Benefit Plan trustees have the requisite discretionary authority to invoke a deferential standard of judicial review, it is to be found in Article III of the trust document, which gives them "full authority * * * with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits, investment of trust funds and all other related

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[18] For that reason, it is at best premature to evaluate petitioner's claim (Pet. 27) that de novo review fosters excessive litigation of benefit denials under ERISA plans, a consideration which in any event this Court in *Firestone* deemed insufficient to justify a different standard of review. 489 U.S. at 114-115.

matters." See Pet. 17.[19] This language, in our view, is ambiguous. While "full authority" denotes broad discretion, the explicit scope of that authority—*administration* of coverage and eligibility, claims processing, and investment—is circumscribed.[20] Moreover, the language is noteworthy for the absence of any express authorization to construe or interpret the terms of the plan.[21] This omission is critical because the denial of coverage to a large class based on the construction of a contract provision cannot fairly be described as a mere exercise of discretion in administration. Cf. *Firestone*, 489 U.S. at 115 (characterizing the denial of severance pay to group of em-

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[19] Petitioner invokes (Pet. 16) two other provisions to support its position on discretion: Article XX(e)(4) and Article XX(g)(3) of the NBCWA. The one gives the trustees the right to sue on behalf of the plan, and the other gives them the power to investigate "the eligibility or ineligibility of any beneficiary." Neither provision is as broad as Article III or as directly relevant to the ultimate issue in this case.

[20] Petitioner places little or no reliance on the phrase "all other related matters" in Article III, see, *e.g.*, Pet. 8 n.6, and any such reliance would, in our view, be unwarranted. The phrase follows a series of circumscribed items and refers to other "related" matters. To read it as giving the trustees broad discretion to interpret ambiguous language would be to strain the phrase to the breaking point.

[21] In *Allied II*—a pre-*Firestone* case in which the court automatically applied the arbitrary and capricious standard—the Fourth Circuit construed Article III as giving the trustees the power "to interpret the provisions of the Trust." 765 F.2d at 416. We do not believe that after *Firestone* the Fourth Circuit would find an exception to the de novo standard based on this determination, since whatever authority the trustees possess to construe the plan is certainly not express or unambiguous. In *Michael Reese Hosp. & Medical Center* v. *Solo Cup Employee Health Benefit Plan*, 899 F.2d 639, 641 (1990), the Seventh Circuit construed strikingly similar plan language, giving the named fiduciary " 'authority to control and manage the operation and administration of the Plan' " (citation omitted), and held that "this provision does not give the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan within the meaning of the [*Firestone*] exception." *Ibid.*

ployees based on the construction of a "reduction in work force" provision as "turn[ing] on the interpretation of terms in the plan at issue," for which the trustees were without fully delegated authority).

The district court aptly compared this ambiguous delegation of authority to the trustees' comprehensive pre-1974 authority. Cf. *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 161 (1966) (interpretation of collective bargaining agreement requires consideration of "the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements"). Until 1974, the trustees of the unified 1950 Plan had "full authority * * * with respect to *questions* of coverage and eligibility, priorities among classes of benefits, [and] amounts of benefits" (emphasis added). See *Robinson*, 455 U.S. at 565 n.2 (citing the 1950 NBCWA). In 1974, however, the BCOA and the UMWA not only divided that plan into four separate plans, but for the first time wrote into the NBCWA specific eligibility criteria and benefit amounts. *Id.* at 566; see Pet. App. 16a-17a. This change no doubt accounts for the simultaneous amendment of the "full authority" language, substituting "administration" for "questions" of coverage and eligibility, and deleting altogether the previous reference to "priorities among classes of benefits [and] amounts of benefits." Whatever else may be said about the post-1974 language, it is obvious that the trustees enjoy full authority over fewer matters relating to coverage and eligibility than before. There was thus a solid basis for the court's conclusion regarding the trustees' limited post-1974 authority.[22] Cf. *Robinson*, 455 U.S. at 573 ("[t]he petitioner

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[22] Comparison to the 1974 Pension Plan, in which the trustees make "full and final determinations as to all issues concerning eligibility for benefits" and "are authorized to promulgate rules and regulations to implement this Plan," is also apt. See *Richards* v. *UMW Health & Retirement Fund*, 895 F.2d 133, 135 (4th Cir. 1990); *Boyd* v. *Trustees of the UMW Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989). While petitioner contends (Reply Br. 4) that there is no difference between this 1974 Pension Plan

trustees [of the post-1974 1950 Benefit Plan] were not given 'full authority' to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement").

Petitioner appears to suggest (Reply Br. 2-3) that *Firestone*'s presumption of de novo review is inapplicable because the board of trustees is constituted, in accordance with Section 302(c)(5) of the LMRA, as a tripartite board with one neutral trustee. But this Court was well aware in *Firestone* that the decisions of the trustees of Section 302(c)(5) plans had been subject to review under the arbitrary and capricious standard. 489 U.S. at 109-110.[23] The Court described the "raison d'etre" of such deferential review as "the need for a jurisdictional basis in suits against trustees." *Id.* at 110. As with all employee benefit plans, this need disappeared with ERISA's enactment, for that statute applies fully to Section 302(c)(5) plans. *Ibid.*; see *Robinson*, 455 U.S. at 575; *Amax*, 453 U.S. at 332-334. The Court stressed in its earlier cases that "in enacting § 302(c)(5) 'Congress

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authority and that granted the same trustees in the administration of the 1974 Benefit Plan, there is a clear distinction in that under the Pension Plan, the trustees have "final" authority as to "all issues" of eligibility.

[23] The arbitrary and capricious standard that prevailed before *Firestone* has been described as "a range, not a point." *Van Boxel*, 836 F.2d at 1052; see *id.* at 1051 (noting that the deference given was less complete than that given to arbitrators "because courts of equity traditionally exercise broad supervision over trustees"). In applying this standard, there is no reason to believe that courts, as a rule, gave greater deference to decisions of Section 302(c)(5) trustees than to those of other fiduciaries. See, *e.g.*, *Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964) ("the Trustees [of the UMWA Health and Retirement Fund of 1950], like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously"). In particular, the lengthy history of litigation involving challenges to eligibility determinations by the trustees of the UMWA Health and Retirement Fund of 1950 reveals an increasing tendency to subject those determinations to heightened review under the arbitrary and capricious standard. See *Maggard* v. *O'Connell*, 671 F.2d 568, 570-572 (D.C. Cir. 1982).

intended to impose on trustees traditional fiduciary duties'" as set forth in the common law of trusts. *Robinson*, 455 U.S. at 573 n.12, quoting *Amax*, 453 U.S. at 330. Since the common law of trusts also provides the underpinning of the *Firestone* holding, and since *Firestone* does "not rest * * * on the concern for impartiality" that is the hallmark of Section 302(c)(5), the Court clearly meant what it said when it stated that "we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries." *Firestone*, 489 U.S. at 115. Thus, the same rules of construction pertain to Section 302(c)(5) plans as to all other plans.

Finally, the fact that application of a more deferential standard of review might ultimately make no difference in this case militates strongly against further review. The district court stated that, "assuming that the appropriate test of trustee discretion is the 'arbitrary and capricious' standard, as urged by the Trustees, we find that the decision to deny benefits to these pensioners was arbitrary and capricious." Pet. App. 30a. That conclusion was based on a thorough analysis of the collective bargaining history, from which the court deduced that the trustees' construction "would have the effect of defeating the expressed intention of the parties to provide lifetime benefits to these pensioners, and render the promise of lifetime benefits illustory." *Id.* at 31a. Moreover, that conclusion is in line with the consistent holdings of other courts (such as the Fourth Circuit in *Royal II*), prior to this Court's decision in *Firestone*, that the denial of coverage under similar circumstances was arbitrary and capricious. *Ibid.*[24]

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[24] The government shares petitioner's concern (Pet. 28) with respect to the long-term financial viability of the plan at issue. Partly to address that concern, the Secretary of Labor is reviewing the November 1990 final report of the Advisory Commission on the United Mine Workers of America Retiree Health Benefits, which addresses health care issues arising from the 1950 and 1974 UMWA Benefit Plans and the effects of resolving those issues on the coal industry as a whole.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC.,
PETITIONER

v.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, BY THOMAS RABBIT, TRUSTEE AD LITEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

On November 5, 1990, this Court invited the Solicitor General to file a brief expressing the views of the United States in this case. The government submitted its brief on February 8, 1991. Petitioner Bituminous Coal Operators' Association, Inc. ("BCOA") now responds to the government's submission.

Although the government opposes BCOA's petition for a writ of certiorari, its brief actually demonstrates why review should be granted in this case. The government contends that the case law applying this Court's decision

in *Firestone* is clear, but the government's own discussion of the relevant decisions belies that contention. The government is unable to articulate a principled basis to reconcile several rulings by the federal courts of appeals reaching conflicting results in similar factual situations. The conflict in the circuits directly affects the trustees involved in this case. Their eligibility determinations now are given deference in the Fourth Circuit, and are subject to *de novo* review in the Third Circuit. The Court should grant certiorari to resolve this conflict.

In addition, the government's brief attempts to gloss over the disturbing reality of this case; namely, that the lower court has rewritten and is on the verge of destroying a major, private, employee benefit fund. Incredibly, the government supports the lower court's decision, which doubles the number of beneficiaries in the fund, even though the government does not dispute the critical fact that not one single individual declared eligible by the lower court satisfies the fund's written eligibility criteria. This is directly contrary to federal law that requires fiduciaries to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D). Hence, this case vividly illustrates the mischief that has developed as a result of the misapplication of this Court's decision in *Firestone*. Under the guise of *de novo* review, a federal court can now usurp the role of a fund's trustees, discard the fund's eligibility requirements, pronounce a whole new class of individuals eligible for benefits, and still get the government's stamp of approval. Only a serious misreading of *Firestone* could produce such a result, and only a clarification of *Firestone* by this Court can protect employee benefit funds from such unwarranted judicial intrusion.

ARGUMENT

I. THE GOVERNMENT'S BRIEF CANNOT EXPLAIN AWAY THE CONFLICT AND CONFUSION THAT HAVE ARISEN IN THE APPLICATION OF *FIRESTONE* BY THE LOWER FEDERAL COURTS.

In *Firestone*, this Court significantly altered the landscape of employee benefits law, and created a new test for federal courts to follow when reviewing the eligibility determinations of plan administrators and fiduciaries. The Court held, in a repeatedly quoted but rarely explained passage, that eligibility determinations are subject to *de novo* review unless the benefit plan gives the plan administrator or fiduciary "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. This 15-word test needs to be clarified. Private litigants and the lower courts do not know what it means or how it should be applied. The government's brief only adds to the confusion.

First, the government acknowledges that there has been a flood of litigation (approximately 70 decisions by the federal courts of appeals) concerning the meaning and application of *Firestone*, even though the decision was issued just two years ago. This substantial quantity of litigation reflects the significant uncertainty that remains even after *Firestone* regarding the proper standard of judicial review of fiduciaries' eligibility determinations.

Second, the government attempts to reconcile scores of appellate cases applying *Firestone*, but its analysis raises more questions than it answers. For example, the government remarkably avoids expressing any view whatever concerning the central argument advanced by respondents—that unless a fiduciary has discretionary authority "to set and change" eligibility standards, his eligibility determinations are not entitled to any deference. As we discussed in our reply brief, however, this is a dangerous misreading of *Firestone* that will improperly thrust

the federal courts into the role of trust fund administrators and fiduciaries. The government's failure to address respondents' central argument to this Court is inexplicable and raises serious questions about the government's position.

Third, despite all of its straining, the government cannot help but admit some of the key points made by petitioner. The government concedes that the *Firestone* test has been applied, and will continue to be applied, to plans, such as the 1974 Benefit Plan at issue here, that were established, and whose trust documents were drafted, long before the decision in *Firestone*. The government concedes that the courts of appeals "have engaged in some fine line-drawing" in those cases. Brief at 12. The government further concedes that courts of appeals have reached different results in construing very similar plan language. *Id.* at 13. Similar delegations of authority to plan trustees have resulted in a deferential standards of review in some cases, and *de novo* review in others. *Id.*, comparing *De Nobel* (4th Cir.), *Curtis* (1st Cir.), and *Lowry* (5th Cir.) with *Baxter* (8th Cir.) and *IBEW Local 47* (9th Cir.). If these conflicting results do not show confusion in the circuits, it is difficult to imagine what would.

Nevertheless, the government suggests that it is understandable for courts of appeals to reach conflicting results when the delegation of authority to plan administrators and fiduciaries arguably is "ambiguous." But as the government's brief demonstrates, ambiguity is in the eye of the reviewer. Broad delegations of authority such as "full authority * * * with respect to administration of coverage and eligibility" suddenly become words of limitation. Under the government's approach, any time a court wishes to second-guess fiduciaries and overturn their eligibility determinations, all it has to do is pronounce the delegation of authority to them as "ambiguous." That cannot be what this Court intended in *Firestone*.

Fourth, in attempting to reconcile decisions such as *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989), and *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989), the government further confuses the issue by stating that it is appropriate, in determining the standard of review, for a court to consider "the nature of the particular trustees' decision" at issue in the dispute. Brief at 14 and n.17. Why this has any bearing on the critical inquiry under *Firestone*—whether the trustees have been granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan"—is not explained. Apparently the government agrees with the anomalous view suggested by *Dzinglski*—that easy decisions are subject to *de novo* review, while hard ones require greater deference to the views of a plan fiduciary or administrator. This novel approach makes no sense and finds no support in *Firestone*.

Fifth, the government's brief reflects the fiction that is being created to justify a *de novo* standard of review in this case. The UMWA Health and Retirement Funds consist of four closely-related funds that were created in collective bargaining by BCOA and the UMWA. The four funds were created at the same time, provide health and retirement benefits to related groups of retired coal miners and their dependents, and function as a single organization. All of the funds are run by the same board of trustees and the same administrative staff of about 340 individuals. The trustees exercise identical power and authority over each of the four funds, including the power and authority to decide who is eligible for benefits. Continuously, for more than a decade, these trustees have decided thousands of disputes over who is eligible for benefits from each of the four funds. No one, including the UMWA, ever suggested before *Firestone* that the trustees did not have "discretionary authority to determine eligibility for benefits or to construe the terms of the plan[s]." That is precisely what these trustees

have done for years, and what they get paid substantial sums to do.

After this Court's decision in *Firestone*, however, many individuals who have been denied benefits by the trustees have seized upon the *Firestone* decision and challenged the trustees' authority, in an effort to obtain *de novo* review of the trustees' denial of benefits. As a result of the lower court's decision in this case, the trustees are now facing conflicting judicial interpretations of their authority. The trustees' eligibility determinations concerning the 1974 *Pension* Plan are now entitled to deference based on decisions such as *Boyd v. Trustees of the UMW Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989), and *Richards v. UMW Health & Retirement Fund*, 895 F.2d 133 (4th Cir. 1990), but their eligibility determinations concerning the 1974 *Benefit* Plan, based on this case, are not entitled to any deference, and are subject to *de novo* review.

These conflicting results are not justified by any real differences in authority granted to the trustees by the settlors of the Funds—BCOA and the UMWA. As noted above, the trustees of the 1974 *Pension* Plan operate with precisely the same amount of authority and discretion as the trustees of the 1974 *Benefit* Plan. Prior to the decision in this case, no court had ever held otherwise. Indeed, in *District 17, UMW v. Allied Corp.*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985), the Fourth Circuit expressly ruled that the 1974 *Benefit* Plan "empowers the Trustees to interpret the provisions of the Trust." 765 F.2d at 416. This is directly contrary to the conclusion of the lower court, and the submission of the government, in this case.

The government attempts to bury the *Allied* case in a footnote (see Brief at 16 n.21) and incredibly suggests, without support, that the Fourth Circuit would somehow reach a contrary decision today, after *Firestone*. This argument shows the fantasy world that the government

and the district court have created to strip the Fund's trustees of their recognized authority. Similarly, the government argues that it is significant that the 1974 *Pension* Plan expressly gives the trustees authority to promulgate rules and regulations, but the 1974 *Benefit* Plan does not. Brief at 17 n.22. But as shown in *Allied*, the trustees of the 1974 *Benefit* Plan have undisputed authority to promulgate rules and regulations, and have exercised that authority on numerous occasions, through the use of a "Question and Answer" system for establishing uniform rules of interpretation of the Plan's terms. *See Allied*, 735 F.2d at 131.

Finally, the government suggests that "any difficulty" and "any uncertainty" in applying *Firestone* are merely temporary because the plans in dispute were written before *Firestone*, and can now be amended with *Firestone* in mind. Brief at 14-15. This assertion, however, ignores the serious conflict that fiduciaries are facing now, and the irreparable harm that these decisions are causing employers. For example, the lower court's decision in this case has already added thousands of beneficiaries to the rolls of the 1974 Benefit Plan, has already cost employers more than $10 million, and continues to cost employers more than $600,000 *per month*. These expenses have been incurred for medical services already rendered, and employers have no reasonable prospect of getting their money back, especially in light of the fact that the district court's bond was limited to $500,000. Further, the collective bargaining agreement in this case has a five-year term that runs until February 1, 1993, and the Union, having prevailed below, can hardly be expected to agree to any amendment that might jeopardize the lower court's decision. The Union is perfectly happy with that ruling, since it provides from the courts a benefit that the Union was unable to obtain at the bargaining table.

In summary, the government's attempt to reconcile the conflicting decisions applying *Firestone* defies reality and

illustrates the confusion that has arisen under *Firestone*. In the real world, the trustees of the UMWA Funds exercise identical authority over each of the Funds, and no one denies it. On paper, the grants of authority to the trustees are not stated in precisely the same words for each Fund, so there is room for skillful lawyers and judges to create ambiguity to attempt to justify their desired result. This unprincipled and result-oriented approach, however, is a dangerous application of *Firestone*, and will undermine the proper administration of employee benefit plans throughout the country.

II. UNLESS THIS COURT GRANTS REVIEW AND CLARIFIES ITS DECISION IN *FIRESTONE*, THE COURTS BELOW WILL HAVE REWRITTEN AND SERIOUSLY JEOPARDIZED A MAJOR EMPLOYEE BENEFIT PLAN.

In BCOA's petition for certiorari, we informed the Court of several critical facts that are not in dispute in this case. First, the 1974 Benefit Plan is funded exclusively by employers such as BCOA member companies that are signatory to a collective bargaining agreement with the UMWA. Second, the 1974 Benefit Plan has written eligibility requirements that were bargained for by BCOA and the UMWA, and those requirements limit eligibility under the Plan to pensioners whose last employer in the coal industry is "no longer in business." Third, *none* of the pensioners in this case satisfy the Plan's eligibility criteria because they all formerly worked for companies that admittedly are still operating in the coal business, albeit on a nonunion or nonsignatory basis. Fourth, all of these companies refused to sign a successor agreement with the Union, stopped contributing to the Plan, and then dumped their retirees into the Plan to obtain health care financed by BCOA members and other signatories. See Pet. at 7-8.

Neither respondents nor the government denies these facts. Remarkably, in this eligibility dispute, even the

government tries to run away from the Plan's eligibility requirements. Instead, the government appears to endorse the Union's "lifetime benefits for everyone" approach, which renders the Plan's eligibility criteria nugatory and ignores uncontroverted evidence regarding the Plan's collective bargaining history and the contemporaneous understanding of the parties. See Reply Brief for Petitioner at 7-9 and Appendices A and B. In short, without addressing any of this evidence, the government is now supporting the absurd result of the district court—that BCOA negotiated eligibility requirements that require its members to pay for the retiree health costs of their non-union competitors.

If this holding is permitted to stand, the 1974 Benefit Plan will fail, and thousands of its legitimate beneficiaries will be left without benefits. Many employers will seek to take advantage of this decision by refusing to sign another contract with the Union, and then dumping their retiree health costs into the Fund for payment by their competitors. Obviously, BCOA member companies and other signatory employers cannot survive in a competitive marketplace by paying the labor costs (especially expensive retiree health costs) of their competitors.

The government belatedly acknowledges this point at the very end of its brief by stating in a footnote that it "shares petitioner's concern with respect to the long-term financial viability of the plan at issue." Brief at 19 n.24. But the government offers no solutions to the catastrophe that the lower courts have created. It is easy for the government to pronounce everyone eligible for health benefits under a private plan, especially when the government is not paying for those benefits. But it should not be so easy, under the proper interpretation of *Firestone*, for a federal court to usurp the role of a plan's trustees and disregard a plan's eligibility requirements. Review by this Court is necessary to safeguard benefits plans from such improper and misguided judicial intrusion.

CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in BCOA's petition and reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 1991

No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., *Petitioner*

v.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

INTRODUCTION

Respondents' opposition distorts both the law and the facts. Respondents advocate a radical revision of this Court's decision in *Firestone*, and argue that unless a fiduciary has the discretionary authority "to set and change" eligibility standards, his eligibility determinations are not entitled to any deference. Respondents' argument for widespread *de novo* review by the judiciary is a dangerous misreading of *Firestone* and will improperly thrust federal courts into the role of trust fund administrators and fiduciaries.

Regardless of what respondents now claim the union "intended" when it negotiated the 1974 Benefit Plan's eligibility criteria in 1978, it is clear that the negotiating

parties agreed to a procedure to decide eligibility questions and resolve benefit claims. The agreed-upon procedure was to name five professional trustees—two appointed by the union, two appointed by BCOA, and a neutral trustee, the former Dean of Georgetown University Law Center—and to empower those trustees with "full authority" to investigate and determine eligibility under the Plan's collectively bargained eligibility criteria. As we observed in the petition (at 13), this Court has repeatedly held that collectively bargained methods of private dispute resolution should be given substantial deference, and that a federal court is not authorized to overturn the product of this chosen procedure simply because the court would have reached a different result. Respondents' position on *de novo* review is contrary to this authority, and eviscerates the parties' agreed-upon method for resolving eligibility disputes.

With respect to the facts, respondents try to convert the union's organizing failures into retiree benefits victories. Respondents do not deny that the Plan contains a detailed "no longer in business" eligibility test, and that every single pensioner in this case last worked for a company that currently is "in business" and operating in the coal industry on a nonsignatory or nonunion basis. Respondents, however, advance the astonishing argument that whenever a coal operator goes nonsignatory or nonunion, that operator's retiree health costs can be dumped into the 1974 Benefit Plan, for payment by the nonsignatory's competitors. Respondents contend that BCOA member companies and other signatory employers contractually agreed to pay for the retiree health costs of their nonsignatory competitors. That claim is absurd. BCOA member companies agreed to provide health benefits for their own retirees and for so-called "orphan" retirees of companies that went completely out of business, but they never agreed to pay for the retiree health costs of their competitors.

ARGUMENT

I. RESPONDENTS ADVOCATE THE WRONG STANDARD OF JUDICIAL REVIEW.

A. Respondents' Erroneous Interpretation Of *Firestone* Highlights The Substantial Confusion That Has Arisen, Since *Firestone*, Over The Appropriate Standard Of Review Of Trustees' Eligibility Determinations.

In a transparent attempt to avoid review of the important legal issue presented here, respondents endorse the district court's characterization of this case as a "straightforward factual dispute." Nothing could be further from the truth. The appropriate standard of judicial review is a crucial issue of national significance. It will have a major effect on the business of the federal courts and on the administration and cost of pension and benefit plans throughout the country. The question is whether the courts should defer to the decisions rendered by professional trustees chosen by the parties to collective bargaining, or whether the courts themselves should assume the primary role of adjudicating disputes about the proper application of plan eligibility criteria.

Respondents' reading of *Firestone* is wrong. Rather than tying the appropriate standard of review to the fiduciary's authority to set and change eligibility criteria, this Court stated in *Firestone* that the standard of review was dependent on the power vested in the fiduciary to make eligibility determinations or to construe disputed or doubtful plan terms. 109 S. Ct. at 954, 956. Plainly, a fiduciary can have the authority to make eligibility determinations or construe disputed or doubtful plan terms, even if he does not have authority to set or change the eligibility requirements. *See Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1329 (8th Cir. 1989) ("the right to change or amend a policy is separate and distinct from the right to have discretionary authority to determine eligibility under a policy").

Some courts have properly interpreted *Firestone* and applied a *de novo* standard of review in the absence of plan language giving plan administrators and fiduciaries authority to make eligibility determinations or construe the terms of the plan.[1] Other courts, however, like the district court here, have ruled that *de novo* review is appropriate even in the face of clear plan language giving administrators and fiduciaries the authority to make eligibility decisions and interpret the plan's disputed terms.[2] Review is necessary to remove this judicial confusion in applying *Firestone*.

This case highlights how different courts have applied *Firestone* to virtually identical grants of authority, and yet have reached totally different results. Specifically, in the *Boyd* and *Richards* cases (*see* Pet. 19-20), which involved the UMWA 1974 *Pension* Plan, the trustees were given the authority to make a "full and final determination as to all issues concerning eligibility for benefits." Here, the very same persons, as trustees of the UMWA 1974 *Benefit* Plan, have been given "full authority . . . with respect to administration of coverage and eligibility." There is no principled basis to conclude that there is any difference—much less a difference of the magnitude suggested by respondents—between the authority granted to the trustees under the two plans. Moreover, it is implausible that BCOA and the UMWA would have jointly selected the same group of professional, salaried trustees for the pension and benefit plans, and then given those trustees discretionary authority to make eligibility determinations for one plan and not for the other.[3]

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[1] *See, e.g., Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348 n.1 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101 (3d Cir. 1989); *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119 (6th Cir. 1989).

[2] *See, e.g., Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989).

[3] Respondents argue that eligibility determinations under the 1974 Pension Plan inherently require more discretion than eligi-

B. The Trustees' Discretionary Authority Was Retained After The 1974 Agreement.

Respondents claim that prior to 1974 the trustees had complete discretion to set and change eligibility requirements, but that as a result of the 1974 Agreement, the trustees were stripped of all of this authority and did not even retain the discretionary authority to determine eligibility or to construe the terms of the Plan. (Br. in Opp. 4-5, 18-19). This assertion is not true. BCOA has never disputed the fact that the trustees can no longer set and change eligibility standards as they did prior to the 1974 Agreement. But the critical fact is that the trustees, after 1974, retained the discretionary authority to determine eligibility and to construe the terms of the Plan. That is the crucial inquiry under *Firestone*.

Respondents' assertion that the trustees lost all of their discretionary authority in 1974 is undercut by the undisputed fact that the trustees in 1978 issued numerous interpretive rules and regulations concerning eligibility for both the UMWA pension and health plans. Significantly, no one, and certainly not the union, ever questioned the trustees' discretionary authority to issue these interpretations. And the trustees' express contractual authority to construe the Plan and to determine who is eligible for benefits has been retained in each successive contract and trust document from 1978 through the present.

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bility determinations under the 1974 Benefit Plan. That is wrong, and erroneously assumes, as did *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989), that the touchstone for the appropriate standard of review is the difficulty of the particular issue facing the trustees, rather than the authority granted the trustees under the terms of the plan. And contrary to respondents' suggestion, the "no longer in business" determination is not a mechanical and routine test. To make this determination, the trustees must investigate the financial and operational status of the pensioner's last employer and render a judgment, based on industry experience, as to whether, *inter alia*, the employer is likely to resume operations.

In summary, the district court's decision demonstrates the confusion in the lower courts in applying *Firestone*, and forebodes serious consequences for employee benefit plans if this trend is permitted to persist. If respondents' position is sustained, every employee and retiree disappointed by an unfavorable eligibility determination will be encouraged to come to federal court for a *de novo* review of his or her benefits denial. That was not the intent of this Court in *Firestone*, and it was not the intent of these negotiating parties.

II. RESPONDENTS FAIL TO SHOW HOW IT CAN BE AN ABUSE OF DISCRETION FOR TRUSTEES TO FOLLOW THE PLAN'S WRITTEN ELIGIBILITY CRITERIA.

Respondents spend two-thirds of their opposition arguing for *de novo* review because they realize that if an abuse of discretion standard is applied, they must lose. Respondents do not explain how the trustees could have abused their discretion by following the Plan's "no longer in business" eligibility criteria, and they do not contend that the pensioners in this case satisfy the Plan's written eligibility requirements. They concede that every single one of the pensioners last worked for companies that admittedly are still "in business" and operating on a nonsignatory or nonunion basis. And respondents do not deny that trustees are required by federal law to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D).

Recognizing that the 1974 Benefit Plan's eligibility criteria exclude the pensioners in this case, respondents argue (Br. in Opp. 20, 24) that those requirements simply do not apply. They maintain that once an employer has gone nonunion and has refused to sign a contract providing health care for its retirees, the retirees are *automatically* covered by the 1974 Benefit Plan, regard-

less of whether the employer is still in business. Respondents say that the "no longer in business" requirement applies only to *signatory* employers during the term of a contract, and not to *nonsignatory* employers that have no "legal obligation" to provide health benefits to their pensioners. This position is untenable. The contract does not contain a "legal obligation" test for eligibility. In addition, respondents' position is contradicted by the record evidence showing that the union itself considered the "no longer in business" requirement applicable to nonsignatories, and never considered "going non-union" to mean going out of business.[4]

Notwithstanding this evidence, however, respondents still argue that the trustees should not have followed federal law and the Plan's "no longer in business" eligibility test, and should have made their determination based on "other factors." These other factors are the alleged promise of lifetime benefits and the *Royal Coal* case, which are discussed in the following sections.

A. Respondents' "For Life" Argument Is Based On A Specious Premise And A Health Services Card That No Longer Exists.

Respondents' argument for ignoring the Plan's express eligibility limitations is based primarily on the erroneous

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[4] For example, in an October 2, 1979 letter from UMWA attorney Peter Mitchell to the trustees' attorney, Laura Kumin, the union acknowledged that pensioners of companies operating on a nonsignatory basis were not eligible for coverage under the 1974 Benefit Plan. (Fund Trial Ex. 9). During the 1981 negotiations, the UMWA president, Sam Church, made a proposal to add such pensioners to the Plan, and stated at the main bargaining table—"Co[mpany] didn't go out of business—went non-union," thus recognizing that such pensioners were not covered under the existing eligibility criteria. (BCOA Trial Ex. 12). And during the 1984 negotiations, the union once again proposed expanding the 1974 Benefit Plan to cover pensioners of nonsignatory employers. The UMWA's contemporaneous bargaining notes stated, "Last employer failed to sign the 1981 Agreement. Want to grandfather them in." (BCOA Trial Ex. 23).

premise that all pensioners in the coal industry, without exception, have been guaranteed lifetime health benefits. Respondents' brief contains 25 separate references to the terms "for life" and "lifetime." Respondents' major premise, however, cannot be sustained for several reasons.

First, as this Court recognized in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), "for life" refers to the duration of benefits, and not who is eligible to receive them. *Robinson* shows that the collective bargaining parties live in the real world and have made compromises (sometimes considered unfair and unreasonable) concerning who is entitled to benefits, and the extent of such benefits. In *Robinson*, this Court upheld the bargaining parties' decision to grant lifetime benefits to some miners' widows but not to others. *Robinson* contradicts respondents' claim to lifetime coverage for everyone.

Second, the contract does not come close to stating that if a pensioner does not receive health benefits from his last employer, the benefits shall be provided by the 1974 Benefit Plan. If respondents' argument were correct, the negotiating parties simply could have said that the 1974 Benefit Plan shall cover all pensioners except those covered by individual employer plans. But that most assuredly is *not* what the negotiating parties did in drafting the detailed "no longer in business" eligibility criteria.

Third, as noted in the petition (at 10), the "for life" language is not eligibility language, is not included in the trust document, and is accompanied by an express disclaimer. In addition, the sole document on which respondents' argument is based is a general description of benefits in which the term "for life" refers not to benefits but to a *health services card* that was discontinued in the 1978 negotiations. Respondents attempt to rely on this health card for such a major proposition is shocking, especially

in light of the fact that the current union president, when running for office in 1982, widely publicized in the union's monthly journal the "cancellation" of the card and described its loss as "tragic." (*See* Appendix A to this brief).

Finally, the record in this case shows that the union was aware that the loss of the health card and the shift to individual company health plans in 1978 would result in less protection for its members. (*See* Appendix B). Significantly, the union at that time did not even suggest that there was an all-encompassing "safety net" to provide the broad coverage that respondents seek in this case. In short, the history vividly shows that it is the respondents who are engaging in a "cynical deception" by asserting contractual entitlements that they know were never won at the bargaining table.

B. The Decisions On Which Respondents Rely Did Not Resolve The Issue Presented Here.

Respondents assert in their brief that six other courts have addressed the precise question presented in this case, and that each of them has found the Plan to be liable. Respondents' assertion is not correct. Four of the cases cited—*Schifano*, *Grubbs*, *In re Chateaugay*, and *In re Kaiser Steel Corp.*—involved employers that went out of the coal business and filed for *bankruptcy*. The fifth case, *Crockett*, was decided on a motion for summary judgment, and there was no evidence that the employer was still operating in the coal business, like all of the employers here. And as we discussed in our petition (at 9), *Royal Coal* did not involve any consideration of whether financially viable nonsignatory coal companies can dump their retirees into the 1974 Benefit Plan, to obtain health benefits paid for by their competitors.

In summary, respondents' opposition provides no justification for the district court's *de novo* review of the trustees' eligibility determinations, and no basis to conclude that the trustees abused their discretion by following the Plan's eligibility requirements. *Firestone* does

not give federal courts a roving commission to second-guess plan fiduciaries, or to disregard a collectively bargained procedure for resolving eligibility disputes. Review is necessary in this case to clarify the substantial confusion that has arisen in the lower courts in applying the *Firestone* decision.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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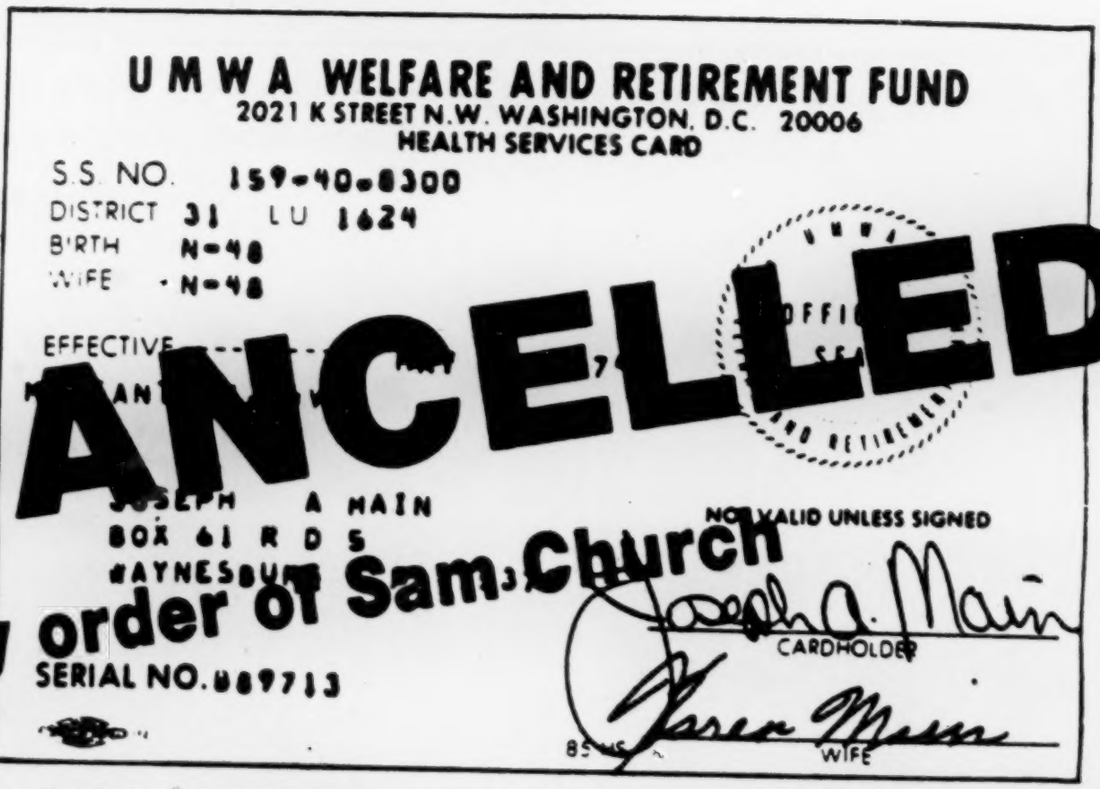
APPENDICES

SAY NO TO TAKE-AWAY CONTRACTS!

HS-85 HEALTH SERVICE CARD



CANCELLED

by order of Sam Church

In 1978 Sam Church Voted THREE Times To Take This Card Away From You

"The present trend of major corporations attempting to extract concessions from their workers might well have had it's beginning with UMWA-BCOA negotiations of 1977-78.

The negotiations, after a 111 day strike, resulted in contract losses to our membership. Perhaps the single most important loss was that of the HS-85 Health Service Card. For our union and our membership that "take-away" can only be described as tragic."

Richard Trumka
September 9, 1982

HERE'S WHY...
The Church Record

What Sam Church Has Given Away In YOUR Contract:

Weakened ☑ Job Security...

He let the operators take away your rights to subcontracted jobs; he eliminated prior practice and custom in subcontracting; he limited your rights in the event of sale or transfer of coal operations; and he limited UMWA work jurisdiction over mine construction jobs.

Today, coal production and profits are soaring and UMWA miners are being laid off in record numbers.

Weakened ☑ Individual Safety Rights...

Church agreed with the operators that miners had too much safety protection. He allowed the companies to restrict your safety rights by requiring "immediate" notification of the Supervisor and the "specific conditions" the miner believes exist. In essence, all miners now must be safety experts in order to protect themselves under the contract.

Under Sam Church, coal miners are dying at the highest rate in years.

Lost ☑ Health Card...

The UMWA health card was the crowning achievement of John L. Lewis and UMWA miners. It represented the finest health care program in the nation. It also was our greatest organizing tool because all miners recognized the value of that card—with the exception of Sam Church. He let the operators take away your health card and replace it with inferior and sometimes questionable—private insurance.

Today, miners run the risk of financial ruin because the operators may choose not to pay the premiums on health care.

Lost ☑ COLA...

Before Sam Church became an International officer, coal miners were protected from inflation by a cost-of-living allowance tied to the consumer price index. As prices rose, so did our wages. Sam Church let the operators take the COLA away because he cares more for the operators than he cares for you.

Today, miners actually earn less in real wages than we did before Church took office.

Undermined ☑ Organizing...

In the past when a signatory coal company opened a new mine, it automatically became a part of the UMWA family. Sam Church agreed with the operators that this wasn't proper and let them take this provision out of our contract.

Today, instead of organizing scab operations, our organizers spend time signing cards at companies that were organized by the UMWA long ago.

Weakened ☑ Seniority...

Seniority used to mean your length of service at the mine. PERIOD. It decided your ability to win a job bid and whether you would be laid off. Under Sam Church, the companies now have the right to assign you to **any job** when they want to realign the work force. You can be denied a job bid even if you are the most senior classified employee bidding. And companies now lay off according to job class.

Today, thanks to Sam Church, your seniority means nothing.

And remember, you were on strike for almost 200 days in 1978 & 1981 to keep the losses down to this. It would have been much worse if Sam had had his way. Just check your copies of the rejected contracts.

"One thing must be sure, not only in the bituminous coal fields of America, but in the anthracite fields as well-in this day there must be no backward step by the mine workers of this country.
"It makes no difference to the organized mine workers of this country that wage reductions have taken place in other industries."

—John L. Lewis 1922

The next UMWA President will negotiate two contracts. Who do you want in charge of those negotiations?